82-1633

NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL,
a Corporation; JOSEPH BARNES;
and RICHARD URQUHART, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Fourth Circuit has created a "special rule of reason" as an affirmative defense which is available to persons whose participation in the "planning" of health care facilities constitutes classic *per se* violations of Section 1 of the Sherman Act. According to the Fourth Circuit, such providers are protected from antitrust liability if (a) their activities are "undertaken in good faith", and (b) the "actual and intended effects" of their activities are among the consequences "envisioned" by federal statutes that encourage and fund the planning of health care facilities. The Questions Presented are:

1. Whether a "special rule of reason," premised largely on the defendants' good faith, should be an affirmative defense to a proven horizontal market allocation conspiracy and a proven concerted refusal to deal, offenses that are admittedly *per se* violations of Section 1 of the Sherman Act.

2. Whether there should be an affirmative defense, analogous to the special rule of reason under Section 1, to a proven attempt to monopolize and a proven conspiracy to monopolize in violation of Section 2 of the Sherman Act.

3. Whether provisions of certain federal statutes that "envision" and "encourage," but not "mandate," private participation in the planning of health care facilities are in such "derogation" of the Sherman Act that planning activities which otherwise constitute *per se* violations of the Sherman Act are protected from the "normal operation of the antitrust laws."

[cont'd]

Petitioner respectfully reserves the right to argue the following questions in the event certiorari is granted on the above questions. These questions are not advanced as reasons why certiorari should be granted.

4. Whether, as a matter of law, a jury in a civil antitrust case must be presented with *more* than a preponderance of the evidence before it is permitted to find that a public official participated in a conspiracy in violation of the antitrust laws.

5. Whether conduct which abuses state adjudicatory and judicial processes and which is part of a larger conspiracy to exclude competition from a market is protected from the antitrust laws under the *Noerr-Pennington* doctrine.

STATEMENT OF RELATED COMPANIES UNDER RULE 28.1

At the time of the acts which gave rise to the causes of action in this action, petitioner Hospital Building Company ("petitioner" or "HBC") was a wholly-owned subsidiary of Charter Medical Corporation ("Charter"), a publicly held company that owns and manages hospitals and other health care facilities in many states. The stock of petitioner has since been sold by Charter to the Hospital Corporation of America ("HCA"), and petitioner is presently a wholly-owned subsidiary of HCA. By contract, Charter retained the right to direct this litigation and the rights to all proceeds from this litigation; HCA has no financial interest in this matter.

Petitioner does not have any partially or wholly-owned subsidiaries. Petitioner's only current affiliates are wholly-owned subsidiaries of HCA; its only prior affiliates are wholly-owned subsidiaries of Charter.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Hospital Building Company respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered on October 19, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Appendix A) is reported at 691 F.2d 678 (1982). The Court of Appeals' order denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix B) is unreported. The District Court issued no opinion; its unreported order entering judgment for petitioner based on the jury's verdict is reproduced as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 19, 1982. *See* Appendix A at 1a. Petitioner HBC timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on January 7, 1983. *See* Appendix B at 23a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1 (1976 and Supp. V 1981), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2 (1976), provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .[1]

STATEMENT OF THE CASE

A. Proceedings Below.

This case is now before this Court for the second time on a petition for writ of certiorari to review a decision against petitioner by the United States Court of Appeals for the Fourth Circuit.

[1] Section 4 of the Clayton Act, 15 U.S.C. §15 (1976 and Supp. V 1981) provides a private right of action to "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."

Petitioner filed this action on October 10, 1972, in the United States District Court for the Eastern District of North Carolina for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1976). The District Court dismissed the case for failure to state a claim affecting interstate commerce. A panel of the Fourth Circuit affirmed the District Court *per curiam;* rehearing *en banc* was granted, and the entire court affirmed on a 5-3 vote. 511 F.2d 678 (1975). This Court granted certiorari, unanimously reversed the Fourth Circuit, and held that respondents' alleged anti-competitive conduct had a substantial effect on interstate commerce. 425 U.S. 738 (1976). On remand, the case was tried for six weeks before a twelve person jury which returned a verdict for petitioner on all counts and awarded damages of over 2.4 million dollars before trebling. Motions for a new trial and a judgment notwithstanding the verdict were denied by the District Court. Respondents thereafter appealed, and the Fourth Circuit reversed the District Court's rulings and the jury's verdict. 691 F.2d 678, Appendix A. The Fourth Circuit denied HBC's Petition for Rehearing and Suggestion for Rehearing En Banc without opinion.

B. **The Parties.**

Petitioner, Hospital Building Company, is a corporation organized under the laws of North Carolina. Petitioner owned and operated Mary Elizabeth Hospital ("Mary Elizabeth"), a 49 bed, for-profit hospital in Raleigh, North Carolina.

Respondent Trustees of the Rex Hospital is a North Carolina corporation which operates the Rex Hospital, a private, tax-exempt, not-for-profit hospital in Raleigh.[2]

[2] For convenience, both the Rex Hospital and the Trustees of the Rex Hospital, a corporation, will often be referred to as "Rex."

Respondent Joseph Barnes was the executive director of the Rex Hospital as well as a trustee of North Carolina Blue Cross-Blue Shield, Inc. ("Blue Cross") from 1960 to 1972. Respondent Richard Urquhart, Jr. was vice-chairman of the Board of Trustees of the Rex Hospital.

C. The Facts.[3]

Respondents and their co-conspirators[4] undertook, beginning in the late 1960's, to allocate the market for provision of general medical-surgical hospital services in the Raleigh, North Carolina, area between Rex and Wake Memorial. This market allocation scheme eventually was formalized into a document and published in the name of the Joint Long Range Hospital Planning Committee of Wake County ("Joint Committee"), an entirely private organization which received no federal or state funding.[5]

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[3] References to the record on appeal are to the Joint Appendix and are cited by volume and page number to the Joint Appendix, *viz*, (VII 2855). Trial exhibits not in the Joint Appendix are cited by their numbers and preceded with a "P" or "D" to indicate the party which introduced the exhibit, *viz*, "P-1432."

[4] The co-conspirators included, among others, Wake Memorial Hospital ("Wake Memorial"), a not-for-profit hospital and the only other general medical-surgical hospital in the Raleigh market, and Blue Cross, the principal third party reimburser for medical care services in North Carolina.

[5] The Fourth Circuit erred factually when it apparently ascribed some type of official status to the Joint Committee. *See* 691 F.2d at 682, Appendix A at 3a. The Joint Committee was, in fact, a private, voluntary organization established by Rex and Wake Memorial. The Joint Committee was comprised of local citizens and controlled by representatives of Rex and Wake Memorial, and it did not meet or operate under the authority of any state or federal statute or regulation. Indeed, the Joint Committee had no more official status than would a committee comprised of representatives of General Motors and Ford who met to "plan" the long range need for automobiles. In a "long range plan" published by the Joint Committee in May of 1971 and titled "Report of Joint Long Range Hospital Planning Committee of Wake County to the Board of Trustees

The Joint Committee was formed and controlled by respondents and their co-conspirators.

Respondents' market allocation scheme, as represented in the Joint Committee's report, was threatened by Charter's purchase of petitioner in 1970 and by Charter's announcement that Mary Elizabeth would be expanded from approximately 49 general-medical hospital beds to approximately 140 such beds through construction of a new hospital. Respondents and their co-conspirators, in order to protect and implement their market allocation scheme, conspired to block this expansion and thus to prevent and eliminate competition from petitioner in the Raleigh market.[6]

The Fourth Circuit did not contest that respondents acted jointly to prevent the expansion of Mary Elizabeth or that respondents' joint conduct constituted *per se* violations of §1. However, the Fourth Circuit focused on respondents' intent and ordered a new trial to permit respondents to present a good faith affirmative defense, apparently in the belief that respondents acted only out of a desire to "plan" for the medical needs of the Raleigh community. The record is susceptible to no such interpretation.[7]

The conspiracy which is the subject of this case was

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of Rex Hospital and Wake County Hospital System, Inc.," the Joint Committee allocated, according to its "plan," all of Wake County's new bed needs between Rex and Wake Memorial. (VII 2878-2904).

[6] Respondents have never contested that the relevant geographic market was metropolitan Raleigh, *i.e.*, Wake County, North Carolina, or that the relevant product market was medical-surgical hospital beds.

[7] Indeed, the record is replete with evidence that the conspirators acted solely for their own economic self interest and that they deliberately set about to delay the construction of a facility that would have provided some of the badly needed medical-surgical hospital beds in Raleigh. (*E.g.*, III 1192-1193; IV 1496-1497; VII 2617, 2621-2624, 2648-2649, 2689-2690, 2702, 2855).

aimed directly at petitioner and, through it, the entry of Charter, an aggressive and efficient operator of for-profit hospitals, into the Raleigh market. This conspiracy was but one aspect, however, of a more general understanding among non-profit hospitals in North Carolina and their primary source of payment, Blue Cross, that every effort should be made to forestall competiton by proprietary hospital organizations. Thus, when petitioner filed for a Certificate of Need in order to proceed with construction of its new hospital, the conspirators put into operation a "primary plan" (VII 2855) to subvert the procedures prescribed by North Carolina law for the awarding of a Certificate of Need by the North Carolina Medical Care Commission ("MCC").[8]

The initial stage in the state procedure was review and consideration by the "areawide health planning council"[9] of petitioner's application to the MCC. After reviewing that agency's recommendation, the MCC was directed to consider the Certificate of Need application, to hold a hearing if it was opposed, and then to approve or deny

[8] North Carolina passed a Certificate of Need law in July, 1971, 1971 N.C. Sess. Laws Ch. 1164 §§90-289 *et seq.* Under that law, the MCC had the exclusive responsibility for determining "need." The law also permitted "areawide health planning councils" to review and comment on certificate of need applications.

[9] The "areawide health planning council" in Raleigh at the time was the Health Planning Council of Central North Carolina ("Central Planning Council"). The Central Planning Council was a voluntary organization formed in 1964. It was supported almost entirely by private funds and local government contributions although it did receive a small amount of federal assistance (II 430-431); its purpose was to provide advisory health service plans to interested entities in several North Carolina counties. (V 2155-2156, VII 2785, 2990). "Planning" by the Central Planning Council was not mandated by any federal statute, and the Central Planning Council did not have the authority to enforce the antitrust laws or impose any of its "plans." More importantly, the Central Planning Council was not authorized to, and did not, consider the competitive consequences of its decisions under the antitrust laws.

the application. If the MCC's decision was contrary to the areawide health planning council's recommendation, that agency could request the MCC to reconsider its decision.

The conspirators (who included the director of the areawide health planning council) made this procedure a device to delay and frustrate petitioner's construction of its new hospital. The conspirators' scheme included multiple abuses of the procedures for obtaining a Certificate of Need by, among other acts, misrepresentations to the MCC, the enlistment of the assistance of Christine Denson, an assistant attorney general of the state of North Carolina,[10] and the adoption of an overall course of conduct which denied effective and meaningful access by petitioner to the MCC.

When petitioner finally obtained its Certificate of Need,[11] the respondents instigated an appeal of that decision to the North Carolina courts, despite legal advice that the appeal was not likely to succeed on the merits and thus would not prevent petitioner from expanding Mary Elizabeth, but could delay that expansion. (VII 2790-2792, 2796-2797).

When a decision by the North Carolina Supreme Court

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[10] The evidence at trial amply demonstrated that Denson, while serving as legal counsel to the MCC, the state agency empowered to grant or deny petitioner's Certificate of Need, went beyond her official duties and actively conspired with respondents to oppose petitioner's Certificate of Need application. (*E.g.*, VII 2689-2690, 2702).

[11] Because respondents were able to subvert the review and comment process of the Central Planning Council and the MCC's procedures, petitioner's application was pending before the MCC for 241 days before it was granted. (VII 2789, 3029-3040). In contrast, Rex's Certificate of Need application, which was filed with the MCC *after* petitioner filed its application, was granted by the MCC in only 67 days. (VII 2759-2772, 2804-2808).

in an unrelated action invalidated the North Carolina Certificate of Need law,[12] the conspirators turned to their "secondary plan." This plan involved an agreement "to keep down proprietary competition" by having co-conspirator Blue Cross impose an arbitrary reimbursement formula upon petitioner in order to make it unprofitable for petitioner to expand Mary Elizabeth.[13] (VII 2855).

These concerted efforts by respondents and their co-conspirators prevented completion of petitioner's new hospital until 1977.[14]

Based upon these facts, all of which were supported by substantial evidence at trial, a twelve person jury in Raleigh, North Carolina returned a unanimous verdict for petitioner for approximately $2.4 million before trebling.

D. **The Fourth Circuit's Decision.**

The Fourth Circuit reversed the jury verdict for the

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[12] The Supreme Court of North Carolina held that the Certificate of Need law was contrary to the state constitution because it (1) constituted a deprivation of liberty without due process of law, (2) established a monopoly in the existing hospitals, and (3) granted existing hospitals exclusive privileges. *See In re Certificate of Need for Aston Park Hospital*, 282 N.C. 542, 193 S.E.2d 729 (1973).

[13] Blue Cross limited reimbursement to petitioner to a formula based on an artificially low, fixed percentage of equity. (III 1192-1193, IV 1496-1497). Not-for-profit hospitals, such as Rex and Wake Memorial, were reimbursed at a much higher rate calculated on actual charges. Blue Cross also refused to recognize any of petitioner's rate increases for reimbursement purposes, but accepted all of the requests for rate increases made by Rex and Wake Memorial. (I 352-353; VII 2860-2872).

[14] Petitioner introduced extensive evidence (which respondents did not controvert with any evidence of their own) that respondents' conspiracy caused a 51-month delay in the construction of petitioner's new hospital, and the jury awarded damages based on that delay. *See* 691 F.2d at 689-90, Appendix A at 17a-20a, and P-1432.

petitioner on its claims under §1 and §2 of the Sherman Act and ordered a new trial on certain aspects of those claims.[15] In so ruling, the Fourth Circuit created a novel "affirmative defense" to the *per se* violations which petitioner proved respondents committed.

The Fourth Circuit reached these results as follows:

(1) The entirety of the Fourth Circuit's reasoning was based on its acknowledgement that petitioner proved, to the satisfaction of the jury, two *per se* violations of §1 [16] by respondents: (a) the horizontal market allocation of medical-surgical hospital beds in the Raleigh area and (b) a concerted refusal to deal with petitioner. *See* 691 F.2d at 684, 686, Appendix A at 6a-7a, 12a-13a.

(2) The panel ordered a new trial on these two §1 violations in order to permit respondents to present a unique affirmative "rule of reason" defense to their *per se* violations. Designed to immunize "certain planning activities that would otherwise violate §1,"—and the implementation of those activities as well—691 F.2d at 685, Appendix A at 10a, the "special" rule promulgated by the Fourth Circuit

> is simply that planning activities of private health services providers are not "unreasonable" restraints under §1 if undertaken in good faith and if their actual and intended effects lay within those envision-

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[15] The Fourth Circuit held that petitioner proved it was "prepared" to construct a new hospital in the Raleigh market. The Fourth Circuit did not order a new trial on that issue. 691 F.2d at 690, Appendix A at 20a.

[16] Practices which are *per se* illegal under §1 of the Sherman Act include price fixing, market allocation, group boycotts (*i.e.*, concerted refusals to deal) and certain types of tying arrangements. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

> ed by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities.

691 F.2d at 685, Appendix A at 10a.

(3) This novel "special rule of reason" defense to established *per se* violations of §1 was derived from the Fourth Circuit's own "view" that "the relevant federal health care legislation is in limited derogation of the normal operation of the antitrust laws. . . ." 691 F.2d at 686, Appendix A at 12a. More particularly,

(a) The panel rested its "view" on a reading of various federal laws, including the Hill-Burton Act of 1946 and the Comprehensive Health Planning Act of 1966, that had as their primary purpose the funding of local health care facilities and which, incidental thereto, encouraged certain types of planning. Among the purposes of such legislation, the Fourth Circuit stated, was the prevention of the use of federal funds for the construction of facilities not needed or poorly located and thus the avoidance of duplicative services and facilities. 691 F.2d at 684, Appendix A at 7a-8a.

(b) While admitting that the statutes it cited were not "altogether clear" on the matter, the panel felt that those statutes "clearly anticipated" and "envisioned" participation by local hospitals and their administrators in the planning and development of health care facilities and services. This type of "envisioned" participation by local health care providers, the Fourth Circuit emphasized, "was merely encouraged and authorized and not mandated" by federal laws. 691 F.2d at 686, Appendix A at 10a. The Fourth Circuit added its own approval to such participation by volunteering that "we think [it] desirable." 691 F.2d at 685, Appendix A at 10a.

(c) From the foregoing "envisioned" participation, the panel deemed that "a very narrow 'rule of reason' is required in order to permit defendants to show, if they can, that participation in certain planning activities that would otherwise violate §1 might not under the circumstances have been an unreasonable restraint on trade." 691 F.2d at 685, Appendix A at 10a. According to the Fourth Circuit, the critical question for the fact-finder was whether the "resources" under consideration by persons who in some fashion engaged in health care "planning" were "needed" to meet the health care requirements of the public. 691 F.2d at 686, Appendix A at 12a.

(4) The Fourth Circuit also held that the respondents were entitled to present an analogous "rule of reason" defense against petitioner's §2 charges and its proof that respondents attempted to monopolize and conspired to monopolize health care facilities in the Raleigh area. In the Fourth Circuit's view, respondents could immunize themselves from §2 violations by proving that they "were primarily motivated by intent to avoid a 'needless' duplication of health care resources. . . ." 691 F.2d at 690, Appendix A at 21a. By adopting this "good motives" defense in health care antitrust cases, the Fourth Circuit rejected the traditional §2 "legitimate business purposes" defense used in other areas of antitrust litigation.

(5) The Fourth Circuit also indicated that (a) the petitioner had not offered enough evidence to allow the jury to infer that an assistant state attorney general — who, under normal standards of proof, was clearly shown to have been a participant in respondents' conspiracy — had done anything more than perform her official duties, and (b) the trial court gave certain erroneous and unneces-

sarily broad instructions with regard to the sham exception to the *Noerr-Pennington* doctrine.[17]

REASONS FOR GRANTING THE WRIT

A. The Decision Below That "Relevant Federal Health Care Legislation Is In Limited Derogation Of The Normal Operation Of The Antitrust Laws" Conflicts With Rulings Of This Court.

The Fourth Circuit, after admitting that the matter is not "altogether clear," held that the relevant federal health care legislation in place at the time of respondents' planning activities and respondents' subsequent actions to enforce those "plans" were "in limited derogation of the normal operation of the antitrust laws." 691 F.2d at 686, Appendix A at 12a. That "derogation" was founded upon the Fourth Circuit's perception that certain statutes "envisioned[,] . . . encouraged and authorized" participation by local health care providers in the local planning of health facility expansion. The Fourth Circuit conceded, however, that such participation was "not mandated." 691 F.2d at 686, Appendix A at 10a.

Although the Fourth Circuit couched its reasoning in terms of "derogation," its decision necessarily provides that certain private conduct, *i.e.*, so-called "health care planning," is actually *immune* from application of settled antitrust principles, including the *per se* doctrine. Simply put, the Fourth Circuit's holding cannot be squared with the principle repeatedly announced by this Court that "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear

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[17] The Fourth Circuit addressed these issues in the context of "additional issues raised by the parties that are relevant to a new trial," 691 F.2d at 687, Appendix A at 13a, but did not rule that the trial court committed reversible error on these points.

repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975). *See also National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981). Just a few weeks ago, the Court took pains to re-emphasize this principle, noting "that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 103 S.Ct. 1011, 1016 (1983). In contrast, the Fourth Circuit here has relied upon an open-ended, amorphous "envisionment" of federal health care legislation to construct a statutory scheme which was, in the Fourth Circuit's words, in "derogation" of the antitrust laws.

Specifically, the Fourth Circuit's use of its "envisionment" test directly conflicts with this Court's application of the "clear repugnancy test" to health care planning activities in *National Gerimedical*, 452 U.S. at 388-89.[18] In *National Gerimedical*, this Court could find no "clear repugnancy" between the antitrust laws and federal statutes which actually established a "statutory scheme" for health care planning.[19] The indicia of non-repugnancy

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[18] The petition for certiorari in *National Gerimedical* relied heavily on this Court's decision in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) ("*Hospital Building Co. I*"), and upon petitioner's subsequent jury verdict. *See* excerpts from the petition for certiorari in *National Gerimedical* which are reproduced as Appendix D. Indeed, the petition in *National Gerimedical* accurately pointed out that the lower court's decision in *National Gerimedical* would effectively undo the decision in *Hospital Building Co. I* by shielding conduct from antitrust scrutiny "not by the statutory interstate commerce hurdle but rather by a much more amorphous blanket exemption tenuously based on planning." Appendix D at 28a.

[19] *National Gerimedical* dealt with "planning" under the National Health Planning and Resources Development Act of 1974, 42 U.S.C.

between the antitrust laws and the federal health care legislation in *National Gerimedical* and the instant case are strikingly similar:

National Gerimedical	Instant Case
1. The defendants' challenged action "was neither compelled nor approved by any governmental, regulatory body." 452 U.S. at 389. Rather, their conduct was a "spontaneous response" to a finding of a local advisory planning body. *Id.*	1. Clearly, the respondents' anti-competitive conduct was neither compelled nor approved by any regulatory body; their acts represented only a "spontaneous response" to petitioner's efforts to construct a new hospital which was not provided for in the conspirators' market allocation scheme.
2. Application of the antitrust laws to the defendant would not "frustrate a particular provision of the [relevant federal statute] or create a conflict with the orders of any regulatory body." 452 U.S. at 390.	2. The Fourth Circuit pointed to no such frustration and conceded that the respondents' challenged actions were "not mandated" by federal law. 691 F.2d at 686, Appendix A at 10a. All it said was that the relevant federal statutes "merely encouraged and authorized," or "envisioned" participation by local hospitals and administrators in the local health facility planning. 691 F.2d at 685-86, Appendix A at 10a.

§§300k-300t-14 (1976 and Supp. IV 1980). That statute, in contrast to the statutes involved in this case, mandated some forms of health care planning. That statute was not, however, enacted until after petitioner filed suit in this case, and it has no relevance to the merits of this action. The Fourth Circuit's decision, however, will clearly enable violators of the antitrust laws to cloak their conduct under the "planning" provisions of various statutes and thus to undermine *National Gerimedical's* holding. *See infra* pp. 22-23.

National Gerimedical	Instant Case
3. There was "no reason to believe that Congress specifically contemplated . . . 'enforcement' [of the local planning agency's decisions] by private insurance providers, let alone relied on such actions to put 'teeth' into the noncompulsory local planning process." 452 U.S. at 391.	3. The Fourth Circuit cited no federal statutory provision giving local hospitals and administrators enforcement powers with respect to the allocation of local health facilities.

The Fourth Circuit's decision pointed to footnote 18 in *National Gerimedical* as support for its view that the statutes it cited were in "derogation of normal operation of the antitrust laws." 691 F.2d at 686, Appendix A at 12a. Such a construction constitutes, we submit, a complete misreading of that footnote. Although this Court did state that some health care activities *regulated* by federal law might require a degree of "antitrust immunity in other factual contexts," 452 U.S. at 393 n.18, no such factual context exists in this case. None of the "planning" activities of respondents were organized under or conducted pursuant to any of the statutes cited by the Fourth Circuit. Furthermore, it is absurd to suggest, as the Fourth Circuit did, that anti-competitive actions (which actually *subverted* the only statutorily mandated health care planning process involved in this case, *i.e.*, the North Carolina Certificate of Need law) were so integral to what Congress "envisioned" as to merit immunity from the *per se* doctrine. *See* C. Havighurst, *Deregulating the Health Care Industry* 160-79 (1982).

It is apparent, therefore, that footnote 18 in the *National Gerimedical* opinion has provided an opportunity,

quickly seized upon by the Fourth Circuit, for that court to impose its own particular "view" as to which conduct is subject to "normal operation of the antitrust laws." 691 F.2d at 686, Appendix A at 12a. We submit that such an opportunity will not be ignored by other courts and that this Court should restate the plain meaning of footnote 18, *i.e.*, that *National Gerimedical* was not intended to encompass each and every aspect of the interplay between health care statutes and the antitrust laws.

Before the Fourth Circuit's opinion becomes precedent for protecting other *per se* illegal conduct that courts find "desirable," this Court should firmly hold that federal laws which merely "envision" and "encourage" local participation in the planning process are "not so incompatible with antitrust concerns as to create a 'pervasive' repeal of the antitrust laws as applied to every action taken in response to the health-care planning process." *National Gerimedical*, 452 U.S. at 393. In *National Gerimedical*, as here, "there was no specific conflict between the [federal act] and the antitrust laws . . . ." *Id.* Where there is no such conflict, this Court has made clear that the normal antitrust concepts, including the *per se* doctrine, remain fully applicable in the health care industry. *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2476 (1982).

B. The Fourth Circuit's New "Special Rule Of Reason" Will Create Confiicts And Confusion In Established Antitrust Doctrines.

The new affirmative good faith defense which the Fourth Circuit labelled a "special rule of reason" can only breed conflicts and confusion. This novel theory will, if not cor-

rected, significantly undercut the chief purpose of the *per se* rule—certainty. Furthermore, the theory of a good faith defense establishes an entirely new category of antitrust analysis which is neither *per se* nor rule of reason but rather a hybrid never sanctioned by this Court. Finally, it is internally inconsistent—there cannot be a *per se* offense whose commission can be protected because it is thought to be "reasonable" or to have been done in "good faith."

(1) The Fourth Circuit has exceeded the bounds of established antitrust analysis by allowing a defendant to interpose a good faith or "rule of reason" defense to a conceded *per se* violation of §1 of the Sherman Act. Good motives or "reasonableness" justifications for *per se* violations of §1 have never been tolerated by this Court. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457 (1941).[20] The Fourth Circuit's decision in this case dismissed these authorities and held that the good faith or good intentions of respondents could somehow justify or excuse their *per se* violations of §1. While the Fourth Circuit believed that its new standard "involve[d] only a modest practical modification of the *per se* rule," 691 F.2d at 686, Appendix A at 12a, that court's unique formulation—which for the first time injects "good faith" into the framework by which even the most pernicious restraints of trade are to be assessed—is clearly an ominous dilution of the *per se* concept under §1.

[20] *See also* L. Sullivan, *Handbook of the Law of Antitrust*, §71 at 194 (1977) ("There is an implacable logic in condemning conduct on the basis of ill effects regardless of benign purposes. It is, in the end, effects—impacts upon the competitive process—which are of social consequence . . . . When competitive processes are or will be stifled by particular conduct, it is small comfort that those engaging in it have other ends in view.")

(2) The Fourth Circuit further undercut established antitrust precedent by injecting new elements into the raditional rule of reason approach.[21] In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court articulated two clear principles with regard to the rule of reason: (a) "the purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of members of an industry." *Id.* at 692; (b) "[u]nder [the rule of reason], the inquiry is confined to a consideration of impact on competitive conditions." *Id.* at 690. Instead of confining the rule of reason to inquiry into the anti-competitive consequences of a restraint, as mandated by *Professional Engineers*, the Fourth Circuit's decision requires fact-finders to determine the "desired" amount of competition in a market, which in this case would require an evaluation of whether petitioner's planned expansion was in fact "needless" duplication of existing resources. *See* 691 F.2d at 685-86, Appendix A at 10a-12a. Thus, the "special rule of reason" compels the fact-finder to substitute its determination of what constitutes adequate or "needful" competition for the free and open functioning of the marketplace. Such a standard misapprehends the purpose and application of the rule of reason, and repudiates this Court's holding in *National Society of Professional En-*

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[21] "[T]he 4th Circuit . . . chose . . . to blaze new trails in the Rule of Reason wilderness. . . . Such a 'defense' surely is not consistent with the 'rule of reason' analysis so emphatically limited in *Professional Engineers*, nor with the hoary notion that good motives will not save otherwise illegal conduct from condemnation under the Sherman Act." Sims & McDonald, *Antitrust Concepts Difficult to Apply to Health Care*, Legal Times, Dec. 20, 1982, 16, 19.

gineers. This cannot be the law.[22]

(3) The Fourth Circuit's decision cannot be reconciled with this Court's decision in *Maricopa County Medical Society*, 102 S.Ct. 2466. Further, it ignores other recent decisions by this Court, including *Hospital Building Co. I*, 425 U.S. 738.[23] These decisions establish a clear body of law, which the Fourth Circuit ignored, that apply the antitrust laws to the health care industry just as those laws apply to other segments of the economy.

In *Maricopa*, this Court emphasized, in the context of a horizontal maximum fee price-fixing conspiracy, that the *per se* test applied in the health care industry to all "practices which the courts have heretofore deemed to be unlawful in and of themselves." 102 S.Ct. at 2473 n.15, 2477. Although the Fourth Circuit recognized that horizontal market allocation schemes and concerted refusals to deal are *per se* violations of the antitrust laws, it nevertheless purported to distinguish *Maricopa* on the grounds that "the instant case does not involve price-fixing." 691 F.2d at 684 n.3, Appendix A at 6a n.3. Such reasoning, we submit, misses the whole point of *Mari-*

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[22] The Fourth Circuit rested its finding of an implied repeal of the antitrust laws solely upon a determination that some type of planning by health care providers was "encouraged and authorized" by federal legislation. 691 F.2d at 684-86, Appendix A at 10a. Thus, "[w]hat the 4th Circuit did . . . was to blur the concepts of implied repeal and rule of reason, and reach a result which is true to neither." Sims & McDonald, *supra* note 21, at 19.

[23] *See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Nat'l Gerimedical*, 452 U.S. 378; *American Medical Ass'n v. F.T.C.*, 102 S.Ct. 1744 (1982); *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540 (1982); *Union Labor Life Ins. Co. v. Pireno*, 102 S.Ct. 3002 (1982); and *Jefferson County Pharmaceutical Ass'n*, 103 S.Ct. 1011.

copa.[24] There can be no principled distinction under §1 between the horizontal price-fixing conspiracy in *Maricopa* and the horizontal market exclusion scheme and the concerted refusal to deal in this case.

This Court held in *Maricopa* that *per se* rules apply in the health care industry. It is essential that a reaffirmation of this principle be clearly communicated to all lower courts so that further attempted deviations from *Maricopa* do not occur.

(4) The Fourth Circuit departed from this Court's holding that any significant change in application of the Sherman Act should come from Congress, not the federal judiciary. *See National Society of Professional Engineers*, 435 U.S. at 689 ("the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition . . . is properly addressed to Congress. . . .") *See also Maricopa County Medical Society*, 102 S.Ct. at 2477. Thus, the Fourth Circuit's decision departs from this Court's application of the separation

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[24] The Fifth Circuit's decision in *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3649 (U.S. March 7, 1983), concluded, based upon *Maricopa*, that tying agreements in the health care industry, as in other industries, were *per se* illegal and did not provide for any opportunity to excuse such conduct through an affirmative defense. The petition for certiorari in *Hyde* did not challenge this aspect of the Fifth Circuit's decision. *See* Petition, No. 82-1031, at 4 n.3 (filed Dec. 17, 1982). The United States' amicus brief in support of the petition also does not question this holding by the Fifth Circuit, but rather acknowledges that proven "*per se* rules under the Sherman Act are applicable to the health care industry as to other industries." Brief of the United States as Amicus Curiae at 4 n.6. Indeed, the aspects of the *Hyde* decision that are before this Court on certiorari involve consideration of the nature and extent of tie-ins and do not call into question whether the *per se* rules of the antitrust laws apply to the health care industry.

of powers doctrine in the antitrust field.

(5) The Fourth Circuit recognized a defense under §2 of the Sherman Act which paralleled the novel defense it created for §1 claims. Although the jury was properly charged that it must find that respondents had the "specific intent" to monopolize in order to be held liable for attempting or conspiring to monopolize under §2, *see* Appendix E at 30a, 32a, the Fourth Circuit held that respondents should have been allowed to prove that they had a particular type of good motive—the intent to avoid the " 'needless' duplication" of competitive health care facilities—in order to evade liability under §2. Accordingly, the Fourth Circuit found erroneous the trial judge's charge that good motives were not a defense to violations of §2. 691 F.2d at 690, Appendix A at 21a.

This Court has long held that §2 is directed against attempted monopolization where the requisite "intent and the consequent dangerous probability" of obtaining a monopoly both exist. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). Similarly, this Court has held that §2 forbids conspiracies to monopolize where the conspirators acquired or maintained the power to exclude competition from the market and had the specific intent and purpose to exercise that power. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

On proper instructions from the trial judge (*see* Appendix E), the jury found that respondents had intended to obtain a monopoly and therefore had violated §2. However, under the new defense recognized by the Fourth Circuit, respondents may now be able to avoid liability by showing that, although they clearly intended to monopolize, their intent was "good," because they wished

to avoid the alleged " 'needless' duplication" of competitive facilities.[25] The Fourth Circuit's new §2 defense allows a defendant to escape liability under the Sherman Act even if all of the elements of a §2 violation are proven by the plaintiff. Thus, the defense created by the Fourth Circuit impermissibly inhibits antitrust enforcement under §2. That defense should be repudiated.

C. The Fourth Circuit's Decision Raises New Issues Of National Importance Under The Sherman Act.

(1) Although the Fourth Circuit's decision appears to apply the "special rule of reason" (rather than either the *per se* standard or the traditional Rule of Reason) only to health care planning cases, its analysis cannot rationally be confined to the context of the health care industry.

At least twenty-three federal statutes (dealing with a wide variety of federal concerns other than health care) provide federal funding for some sort of state or local

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[25] The Fourth Circuit analogized the defense to violations of §2 which it created to the often recited rule that specific intent may not be inferred where the defendants' activities are motivated by legitimate and proper business considerations. 691 F.2d at 690, Appendix A at 21a. The Fourth Circuit's new defense, however, operates differently and has much broader implications than the rule concerning legitimate and proper business considerations. A finding that a defendant's anti-competitive conduct is motivated by legitimate and proper business considerations simply precludes the conclusion that the defendant intended to destroy competition. Accordingly, the "legitimate and proper business considerations" rule can be explained as an effort to protect an intention to prevail over one's rivals by legitimate means. *See* 3 P. Areeda & D. Turner, *Antitrust Law* §822a (1978). In contrast, the Fourth Circuit's newly recognized defense is not concerned with the protection of proper means of competition. Rather, it protects all forms of anti-competitive conduct—no matter how pernicious—which are employed to limit competition to an arbitrarily defined "needed" amount of competition.

"planning" activity or "regulate" entry into a market by a competitor.[26] If the Fourth Circuit's decision is left unreviewed, blatantly anti-competitive conduct, which is carried out by persons purportedly engaged in "planning" under any of those statutes, could be protected from application of the *per se* test. Thus, the Fourth Circuit's decision has the far-ranging potential to undercut the *per se* test as a tool for antitrust enforcement. Such a development would impose significant new burdens on the federal judiciary in countless antitrust cases.[27]

For this reason, the Fourth Circuit's opinion raises major issues of national concern under the antitrust laws. Whether *any type* of "planning" should be judged under a special rule of reason because *some* "planning" is "*envisioned*" is squarely presented in this case. To wait for the Fourth Circuit's confusing, aberrational test to be considered by other lower courts will prolong and imperil antitrust enforcement in all situations where "planning" is even arguably "envisioned" by a federal statute.

(2) Even if the Fourth Circuit's decision is confined to the health care industry, that decision is still of national importance to enforcement of the antitrust laws. Antitrust cases involving the provision of health care have increased as the health care sector of our economy has grown in relative and absolute terms.[28] Because of the

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[26] These statutes are listed in Appendix F.

[27] The *per se* test was fashioned by this Court, in part, to relieve the time consuming burden of permitting every defendant to justify anti-competitive conduct as somehow being "reasonable." *See Northern Pacific Ry.*, 356 U.S. at 5, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); L. Sullivan, *Handbook of the Law of Antitrust* 193 (1977).

[28] For example, in 1975, only 16 decisions in antitrust/health care cases were reported; by 1981, that number had almost quadrupled to 61. These statistics were obtained through a LEXIS search. *See also*

growing importance of health care/antitrust law, this Court, we submit, should make it clear that, in the absence of Congressionally mandated protection, there is no "planning" defense to hard core *per se* violations of §1.

Under current federal health planning statutes,[29] "planning" is carried out by health systems agencies ("HSAs"), quasi-governmental agencies that are partially funded by the federal government, and by State Health Planning and Development Agencies. There are more than 200 HSAs in the United States, each with jurisdiction over a particular geographic area.[30] HSAs receive, on the average, over 6000 applications from health care providers each year.[31] Each of these applications presents the possibility for anti-competitive conduct similar to that suffered by petitioner at respondents' hands. In order to prevent other abuses of these processes and to preclude future market allocation schemes undertaken in the name of "planning," it is time, we respectfully submit, for this

Halper, *The Health Care Sector and the Antitrust Laws: Collision Course*, 49 Antitrust L. J. 17-18 (1980) pointing out that health care expenditures now constitute 9% of our gross national product and that five times more health care antitrust cases were brought between 1975 and 1980 than between 1890 and 1975.

[29] The National Health Planning and Resources Development Act of 1974, as amended, 42 U.S.C. §§300k - 300t-14 (1976 and Supp. IV 1980). The effect of these statutes on application of the antitrust laws to health care planning was discussed by this Court in *National Gerimedical*, 452 U.S. 378. These statutes were enacted after petitioner's complaint was filed and have no application to the merits of this case. Certainly, however, cases which do involve the 1974 statute and amendments thereto will be considered under the Fourth Circuit's test if that decision is allowed to stand.

[30] *See* J. Simpson & T. Bogue, *The Guide to Health Planning Law* xx (1982).

[31] HRA-45, Data Systems Table No. 2, John Gold, Director, Department of Health and Human Services, Division of Regulatory Activity. In 1981, 1980 and 1979 there were, respectively, 6410, 7005 and 4771 applications to HSAs.

Court to rule firmly that federal health care planning legislation does not "envision" or "encourage" naked restraints of trade or protect such practices from the *per se* doctrine.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,
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Dated: April 6, 1983

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1134

HOSPITAL BUILDING COMPANY,
Appellee,

vs.

TRUSTEES OF THE REX HOSPITAL,
a Corporation; JOSEPH BARNES;
RICHARD URQUHART, JR.,
Appellants,

NORTH CAROLINA HOSPITAL ASSOCIATION
and THE STATE OF NORTH CAROLINA,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Herbert Maletz, District Judge.

Argued: November 2, 1981 Decided: October 19, 1982

Before HALL, PHILLIPS and CHAPMAN, Circuit Judges.

Ray S. Bolze (Mark W. Pennak, Ronald K. Perkowski, Howrey and Simon; Thomas W. Steed, Jr., Noah H. Huffstetler, III, Allen, Steed and Allen, P.A. on brief) for Appellants; John K. Train, III (Frank G. Smith, III, Leah J. Sears-Collins, Alston, Miller & Gaines; Charles Gordon Brown; John R. Jordan, Jr., Jerry S. Alvis, William M. Trott, Young, Moore, Henderson & Alvis on brief) for Appellee; (W. C. Harris, Jr., Harris, Cheshire,

Leager & Southern on brief) for Amicus North Carolina Hospital Association; (Rufus L. Edmisten, Attorney General of the State of North Carolina, William F. O'Connell, Special Deputy Attorney General, Robert L. Hillman, Assistant Attorney General on brief) for Amicus Curiae The State of North Carolina.

CHAPMAN, Circuit Judge:

This appeal is from a $7.3 million dollar treble damages judgment against appellants Trustees of Rex Hospital, Joseph Barnes and Richard Urquhart, Jr. The judgment was entered after a six week jury trial in the District Court for the Eastern District of North Carolina. The jury returned a verdict for appellee Hospital Building Company ("HBC") on its claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.[1]

Appellants seek reversal of the judgment below on grounds that: (1) the district court applied an incorrect *per se* rule of antitrust liability; (2) appellants' opposition to HBC's certificate of need application is protected from antitrust liability under the *Noerr-Pennington* doctrine; (3) HBC failed to prove "antitrust damages" or to establish that the alleged antitrust violations proximately caused HBC's alleged injuries; and (4) HBC was not prepared to enter the Raleigh, North Carolina area in-patient services market in 1972. Appellants urge this court to remand the action for entrance of judgment notwithstand-

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[1] This matter is before us for a second time. HBC's action was initially dismissed for failure to state a claim affecting interstate commerce. A panel of this court affirmed. Dismissal was upheld again on rehearing *en banc*, *Hospital Building Company v. Trustees of Rex Hospital*, 511 F.2d 678 (4th Cir. 1975). The United States Supreme Court granted certiorari, 423 U.S. 820 (1975), and reversed, ruling that the complaint alleges a restraint of trade substantially affecting interstate commerce. 425 U.S. 738 (1976).

ing the verdict or, in the alternative, to remand for a new trial.

I

HBC is a proprietary North Carolina corporation organized in 1946 to operate Mary Elizabeth Hospital in Raleigh, North Carolina. Rex Hospital is a non-profit hospital established in Raleigh in 1840. The trustees of Rex Hospital are appointed by the Raleigh City Council. At all times relevant to HBC's claims, Joseph Barnes was the chief executive officer of Rex Hospital and Richard Urquhart, Jr. was vice-chairman of the Board of Trustees of Rex Hospital.

HBC offered evidence that appellants met with representatives of Blue Cross/Blue Shield Association of North Carolina and others in October of 1970 and conspired to discourage proprietary competition in the North Carolina in-patient health services market. HBC's proof shows that in 1969 Rex and Wake Memorial Hospitals organized an *ad hoc* committee of 26 Raleigh citizens to study the need for in-patient health services in the Raleigh area. It is HBC's position that the committee, officially known as the Joint Long-Range Hospital Planning Committee of Wake County ("Joint Committee"), was controlled by representatives of Rex Hospital, Wake Memorial Hospital and Blue Cross/Blue Shield.

A national proprietary hospital chain, Charter Medical Corporation, acquired HBC in December of 1970. Shortly thereafter Charter Medical announced plans to expand Mary Elizabeth Hospital, proposing either to enlarge it, or perhaps to build a new, much larger hospital elsewhere in Raleigh.

In May of 1971, the Joint Committee issued its report on the demand for hospital services in the Raleigh area. The report recommended that by 1980 Wake Memorial

should expand from 340 to 540 beds and that Rex Hospital build a new 500 bed hospital to replace its then existing facility. The report also contemplated HBC expanding Mary Elizabeth from 40 to 60 beds.

On July 21, 1971, the North Carolina Legislature enacted a certificate of need law, requiring persons to obtain state agency approval of any expansion of in-patient facilities prior to commencing construction of the new facility. On November 1, 1971 HBC filed an application to replace the existing 49 bed Mary Elizabeth Hospital with a new 140 bed general proprietary hospital.[2]

HBC asserts it proved that the co-conspirators formulated a primary and a secondary plan for halting HBC's plans to expand Mary Elizabeth Hospital. The primary plan, HBC asserts, was to kill the planned expansion by keeping HBC from receiving a certificate of need for construction of its new hospital. The secondary plan HBC attempted to prove was imposition of a discriminatory reimbursement schedule to reduce HBC's profits.

HBC's application for a certificate of need was initially referred to the Health Planning Council of Central North Carolina ("Central Planning Council"). HBC offered evidence that appellants, with the aid of the chairman of the Central Planning Council, were able to dominate the council and subvert it to their own purposes. The Central Planning Council denied HBC's application on Janaury 5, 1972.

HBC appealed the Central Planning Council's decision to the North Carolina Medical Care Commission ("MCC"), where HBC asserts that Rex, Blue Cross/

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[2] Mary Elizabeth Hospital apparently had 49 beds when the application was filed. The Joint Planning Committee proceeded on the assumption that Mary Elizabeth had only 40 beds.

Blue Shield, the Central Planning Council, and others conspired to have the MCC reject the application. The application, according to HBC, met all the criteria for issuance of the desired certificate of need. When the MCC granted HBC's application on May 5, 1972, HBC asserts that the conspirators saw that they could not secure rejection of HBC's application. The primary plan of opposing expansion of proprietary hospital services then shifted from an attempt to secure rejection of the application to attempts to tie up the application administratively in hopes that a series of administrative delays would kill the planned expansion.

The Central Planning Council successfully petitioned for a rehearing before the MCC. On June 30, 1972 the MCC reaffirmed its decision to grant HBC's application. On July 28, 1972 the Central Planning Council appealed the MCC's decision granting the certificate of need to the Wake County Superior Court. This appeal was mooted on January 26, 1973 when the North Carolina Supreme Court struck down the North Carolina certificate of need law as violative of the state's Constitution.

After the certificate of need law was declared unconstitutional, HBC claims the co-conspirators shifted to a secondary plan of frustrating HBC's attempts to construct a new hospital. This plan, HBC argued, involved imposition of a discriminatory reimbursement formula on HBC and another proprietary hospital operating in North Carolina. Under this alleged plan, Blue Cross/Blue Shield limited the amount of insurance reimbursement proprietary hospitals received.

HBC claims that the delay engendered by the co-conspirator's primary plan and the later discriminatory reimbursement prevented it from starting construction on the

new hospital until 1977. At trial HBC was awarded damages for profits lost due to delay in the opening of the hospital, increases in construction costs over the period of the delay and increases in equipment costs over the period of the delay.

II

Under current antitrust standards, certain recurring business practices, "because of their pernicious effect on competition," are considered illegal *per se* under the Sherman Act. *See e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972) and *North Pacific R. Co. v United States*, 356 U.S. 1, 5 (1958). On its face, § 1 of the Sherman Act appears to bar any combination of enterpreneurs so long as it is "in restraint of trade." In lieu of such a broad interpretation of § 1, the Supreme Court adopted a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. *United States v. Topco Associates, Inc., supra*, at 606-07. The practical difference between a *per se* offense and a rule of reason offense is that under the *per se* rule, anticompetitive impact of the alleged offense is presumed, while under the rule of reason, its anticompetitive impact must be proven. *Arizona v. Maricopa County Medical Society*, 50 U.S.L.W. 4687 (1982).[3] The violations HBC asserts it proved in this case—horizontal market allocation scheme and a concerted refusal to deal—are generally *per se* violations

[3] The United States Supreme Court decided the *Maricopa County* case after argument in this matter had been heard. We recognize that *Maricopa County* applies the *per se* rule to allegations of price fixing in the health care industry. Unlike *Maricopa County* the instant case does not involve price fixing. Furthermore, the limited application given the rule of reason in this case is justified on much different and narrower grounds than those discussed in *Maricopa County*.

of the antitrust laws. *United States v. Topco, supra;* and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Federal and state laws, enacted at the time the instant antitrust violations are alleged to have occurred, indicate that governmental authorities considered oversupply of health care services and maldistribution of in-patient health care facilities as substantial roadblocks to more cost effective operation of the health services market. In an effort to contain these costs, both state and federal authorities advocated state and local health care planning.

Congressional action on health care planning and control originated with enactment of the Hill-Burton Act of 1946, Pub. L. No. 79-725, 60 Stat. 1049 (1946) (codified in scattered sections of 5, 8, 14, 24, 31, 33, 42, 46, 48 and 49 U.S.C.) (1976). The program initiated by the Act was designed to alleviate deficiencies in the supply and distribution of health care facilities. The Act provided state agencies with an initial grant to survey and study hospital needs, with federal funds thereafter made available to participating states to construct, expand or modernize according to the survey.

By the mid-1960's Congress had become more concerned with oversupply of hospital services in specific localities. In 1964 it amended the Hill-Burton Act to provide fifty percent of the cost of comprehensive regional, metropolitan area, or other local area plans for coordination of existing and planned health care facilities. Hospital and Medical Care Facilities Amendments of 1964, Pub. L. No. 88-443, § 318, 78 Stat. 447 (1964) (codified in 42 U.S.C. §§ 247c, 291-291o) (1970 and 1976). This funding was intended to prevent construction of facilities "which are not needed or are poorly located" and to avoid

"the unnecessary duplication of services and facilities." S.Rept. No. 1279, 88th Cong., 2d Sess. 3 (1964).

In 1966 Congress enacted the Comprehensive Health Planning Act, Pub. L. No. 89-749, 80 Stat. 1180 (1966) (codified in 42 U.S.C. §§ 242g, 243, 246 and 247a) (1976). This act encouraged state and local planning agencies to draw plans for development of health care facilities, to review federal grants for health services and to participate in the planning and development of health care needs. The act required the state to:

> (d) provide for encouraging cooperative efforts among governmental *or nongovernmental* agencies, organizations and groups concerned with health services, facilities, or manpower, and for cooperative efforts between such agencies, organizations, and groups . . . in the fields of education, welfare, and rehabilitation. (emphasis added). § 314(a)(2)(D) (codified in 42 U.S.C. § 246(a)(2)(b)) (1976).

The House Report stated that approved state plans "must provide for cooperative efforts among governmental *or nongovernmental* health agencies and groups" upon pain of losing federal funding. H.R. No. 2271, 89th Cong. 2d Sess. at 12 (1966) (emphasis added).

As noted above, the North Carolina legislature enacted a certificate of need law on July 21, 1971. 1971 N.C.Sess. Laws. Ch. 1164 § 90-289. In 1972, Congress enacted the § 1122 amendments to the Social Security Act. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) (codified in scattered sections of 42, U.S.C.) (1976). The thrust of these amendments was to require a determination of need for any proposed health facilities prior to construction. Reimbursement under medicare and medicaid was conditioned on approval of the new construction.

According to appellants, the above enactments "established a 'public policy contemplating' that the Health Planning Council, the defendants and other persons concerned with health care, participate in precisely the sort of planning efforts engaged in by the Committee." Appellants argue that since these planning activities fell "within the scope and purposes" of federal legislation, the activities were exempt from the antitrust laws.

None of the above mentioned health planning legislation contains an express exemption from the antitrust laws. Therefore, any exemption from the antitrust laws must be implied. As the Supreme Court recently noted in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 425 U.S. 378, 388-89 (1981):

> The antitrust laws represent a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966); see *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399 (1978). "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720 (1975); see *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682 (1975); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

HBC argues that none of these enactments "provides for self-regulation by the hospital industry." While these acts do not mandate participation by local hospitals or their administrators, participation by private health care

providers is clearly anticipated and we think desirable. It would be wasteful, and potentially impossible to engage in local health care planning without drawing on the expertise of local hospital administrators and physicians.

We think a very narrow "rule of reason" is required in order to permit defendants to show, if they can, that participation in certain planning activities that would otherwise violate § 1 might not under the circumstances have been an unreasonable restraint on trade. The appropriate rule, we find, is simply that planning activities of private health services providers are not "unreasonable" restraints under § 1 if undertaken in good faith and if their actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities. *See, Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963).

The scope and purpose of such legislation must, of course, be determined in order to apply this rule of reason since it must be given to the trier of fact as the benchmark by which reasonableness of conduct is to be gauged. This is a question of law—of statutory interpretation—for the courts, and because it is properly before us on this appeal, it is appropriate for us to decide it for application in further proceedings in this case.

The type and extent of participation in planning by health care providers that Congress envisioned in the statutes relied upon by defendants here is not altogether clear, but it is clear that what was envisioned was merely encouraged and authorized and not mandated. *See,* Hospital and Medical Facilities Amendments of 1964, *supra;* S. Rept. No. 1279, 88th Cong., 2d Sess. 3 (1964); Partnership for Health Amendments of 1967, Pub. L.

No. 90-174, 81 Stat. 533 (1967) (codified in scattered sections of 42 U.S.C.) (1970 and 1976); S. Rept. No. 724, 90th Cong., 1st Sess. 3 (1967); Heart Disease, Cancer, Stroke & Kidney Disease Amendments of 1970, Pub. L. No. 91-515, 84 Stat. 1297 (1970) (codified in scattered sections of 42 U.S.C. (1976); H. Rept. No. 91-1297, 91st Cong., 2d Sess. 12 (1970); Medical Facilities Construction & Modernization Amendments of 1970, Pub. L. No. 91-296, 84 Stat. 336 (1970) (codified in scattered sections of 12, 21 and 42 U.S.C.) (1970 and 1976); and S. Rept. No. 92-657, 91st Cong., 2d Sess. 13 (1970). This suggests a fairly narrow interpretation of the range of the conduct that may properly be given an effect in derogation of normal operation of the antitrust laws. *Cf. National Geri-medical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 393 n.18 (1981); *Silver v. New York Stock Exchange, supra.*

So construing the statutory authorization relied upon here we find it runs only to good faith participation in planning activities aimed at avoiding the needless duplication of health care resources in an affected area. *See e.g.*, Hospital and Medical Facilities Amendments of 1964, *supra*, and S. Rept. No. 1279, 88th Cong., 2d Sess. 3 (1964). Obviously it cannot be interpreted to allow the blanket use of "planning" as a means by which some health care providers act to avoid competiton by others for any other purpose and on any other justification. *See Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). Specifically we hold that "planning" under this special rule of reason is not "reasonable" if its purpose or effect is only to protect existing health care providers from the competitive threat of potential entrants into or expanders within the same "market."

The critical question in application of this rule is likely always to be whether the "duplication of resources" sought to be avoided by planning—almost inevitably a feature of any planning activity challenged by an outsider seeking entry or an insider seeking expansion—is in fact "needless" duplication. Proper application of the rule requires that whether it is "needless" or "needful" be gauged by the fact-finder in relation to the health care needs of the consumer public in the market area at the time in question, objectively assessed, and not in relation to the economic or other needs of the "planners", either objectively or subjectively assessed.

Because on this view the relevant federal health care legislation is in limited derogation of the normal operation of the antitrust laws, we further think that the burden of proof to show reasonableness of challenged planning activities under this special rule of reason should be allocated as an affirmative defense to defendants seeking on this ground to avoid antitrust liability. On this basis a claimant, such as plaintiff here, makes out a prima facie case by showing acts that, but for the health care planning legislation, would constitute a *per se* violation of § 1 under traditional antitrust principles. This establishes liability for appropriate damages unless the defendants then persuade the trier of fact by a preponderance of the evidence that their planning activities had the purpose (and effect if plaintiff proves anticompetitive effects) only of avoiding "needless" duplication of health care resources under the objective standard of need above defined.

While this affirmative defense is concededly a narrow one that may be thought to involve only a modest practical modification of the *per se* rule applied below, defendants are entitled in further proceedings to have it

applied to the extent the evidence on retrial may justify. Accordingly, we find that the judgment below for HBC must be reversed and the case remanded for a new trial applying the above rule of reason rather than a strict *per se* basis of antitrust liability.[4] Since the matter must be retried, we now address the additional issues raised by the parties that are relevant to a new trial.

III

Appellants dispute whether the illegal conduct allegedly attributable to them falls within the so-called sham exception to *Noerr-Pennington* antitrust immunity.[5] HBC asserts it offered proof: (1) that appellants, aided by the chairman of the Central Planning Council, appropriated the powers of the council, effectively denying HBC meaningful access to the Central Planning Council; (2) that appellants engaged in spurious litigation before the MCC and the Wake County Superior Court to further the conspiracy by delaying approval of HBC's application for a certificate of need; (3) that appellants suborned the neutrality of an assistant attorney general of North Carolina assigned to act as counsel for the MCC; and (4) that appellants made numerous misrepresentations to government officials in their efforts to defeat HBC's application.

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[4] Appellants also seek a new trial on their counterclaims for abuse of process and libel. Since appellants have asserted no error with respect to the trial of these issues, and since the retrial of the antitrust issues will be sufficiently complicated without introducing these additional issues, judgment for HBC on appellants' counterclaims is affirmed.

[5] In *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court established that no violation of the antitrust laws can be predicated upon attempts to influence the passage or enforcement of laws, even if efforts in that regard are based upon anti-competitive motives.

Actions taken to discourage and ultimately prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception to *Noerr-Pennington* immunity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-513 (1972). Thus, proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC from meaningful access to the Central Planning Council and the MCC, is within the sham exception to *Noerr-Pennington*. *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.*, 663 F.2d 253 (D.C.Cir. 1981). In *California Motor Transport Co., supra*, the court stated that when the proof establishes "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused", *Id* at 513, such actions are not entitled to antitrust immunity. As noted in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 482 n.9 (4th Cir. 1980), the critical inquiry with respect to alleged frivolous litigation is whether the challenged litigation is undertaken with intent to interfere directly with a competitor's business. See, *California Motor Transport Co., supra*, at 511. We believe that appellants are not immune from antitrust liability if the proof establishes they were engaged in a baseless appeal to the Superior Court of Wake County with intent to delay approval of HBC's application for a certificate of need and thereby delay its entrance into the Raleigh market.

Appellants raise several objections to Judge Maletz's charge on *Noerr-Pennington* immunity. We agree with appellants that misrepresentations, to fall within the sham exception to *Noerr-Pennington* immunity, must be made with the requisite intent. In these circumstances, for ex-

ample, misrepresentations made with intent to abuse the administrative processes so as to deny HBC meaningful access to the MCC would fall within the sham exception.

At page 27 of its instructions the court says that "conduct in abuse of the adjudicatory or judicial process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws." We are unprepared at this time to approve such an unnecessarily broad definition of the sham exception. As noted above, HBC asserts that it proved a conspiracy to deny it meaningful access to the Central Planning Council and that it proved appellants undertook fruitless appeals solely to delay approval of HBC's application. We find that proof of misrepresentations made with this type of intent clearly falls within the sham exception to *Noerr-Pennington*, but hesitate at this time to rule that any act accompanying a larger conspiracy in restraint of trade, which also may be fairly characterized as "abuse of process," falls within the sham exception. See *Noerr, supra*, at 670.

At page 28 of its instructions the court states: "If the courts are used or litigation is filed as part of an overall scheme to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity." This charge is erroneous in light of *California Motor Transport Co., supra*, which extends *Noerr-Pennington* immunity to the adjudicatory setting. There is still a sham exception applicable to judicial proceedings, if such proceedings are baseless, repetitive and brought with the intent to abuse the judicial process.

In its capacity as amicus curiae, the State of North Carolina asserts that the district court erred in allowing

the jury to infer that an assistant attorney general was a member of the alleged conspiracy. As noted above, the State of North Carolina has encouraged hospital planning as a mechanism for controlling costs in the in-patient health services market. The attorney general of North Carolina is charged with representing the public interest at hearings before government agencies, including those engaged in health services planning. If an assistant attorney general appears before a government planning agency, a jury should not be allowed to infer that the assistant attorney general was a part of an alleged antitrust conspiracy involving that planning council unless there is some specific evidence the official was not merely performing his or her assigned duties. *Cf., Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (affirming a directed verdict on the basis of overwhelming evidence of independent business purpose).

The attorney general of North Carolina asked assistant attorney general Christine Denson to meet with representatives of the Central Planning Council to insure that its witnesses were properly presented at the hearing before the MCC. The Central Planning Council opposed HBC's application for a certificate of need as it was statutorily authorized to do. The evidence indicated that the attorney general's office doubted that the Central Planning Council's participation in the hearing would be effective unless it received assistance from a state attorney. Denson was asked to insure that the MCC's decision was based on a full record. Pursuant to these instructions, Denson offered to assist both HBC and the Central Planning Council in preparing proposed findings of fact. Only the Central Planning Council asked for assistance.

On the basis of this evidence the district court allowed the jury to conclude that Denson participated in the illegal conspiracy. We do not believe that HBC has offered sufficient evidence that Denson was not merely fulfilling her duties as an assistant attorney general and was instead knowingly contributing to the illegal conspiracy by assisting the Central Planning Council in its attempts to prevail before the MCC. Absent more telling evidence, a jury should not be permitted to infer that an assistant attorney general was a participant in an antitrust conspiracy.

IV

Since introduction of the rule of reason into this action changes the standard of liability, the court below will, of course, once again address the issue of proximate cause on remand. Appellants raised the issue of proximate cause in this appeal, and we believe some discussion of this issue will be helpful upon remand.

HBC claims that the damage award it received below was based on the following sequence of events: (1) appellants' opposition to HBC's application delayed construction of the hospital until February 9, 1973, the date the North Carolina certificate of need law was declared unconstitutional; (2) the § 1122 amendments to the Social Security Act further delayed HBC until May 11, 1973, when federal approval under § 1122 was granted; and (3) rising interest rates, other unfavorable financial conditions and Blue Cross/Blue Shield's discriminatory reimbursements prevented HBC from resecuring a line of credit for construction of the new hospital until after its initial line of credit expired in June of 1973. Appellants claim HBC failed to prove "antitrust damages" or to

establish that its alleged damages were proximately caused by the alleged antitrust violations.

Turning first to the proximate cause issue, HBC alleged, and apparently the jury believed, that appellants had initially attempted to prevent HBC from receiving a certificate of need and later, after it became apparent that the MCC was going to grant HBC a certificate of need, that appellants attempted to delay the granting of the certificate of need by engaging HBC in further proceedings before the MCC and in an appeal before the Wake County Superior Court. An obvious motivation of such delaying tactics is the hope that during the interim, an unforeseen occurrence will discourage or prevent the opposing party from realizing its plans. Appellants can hardly claim to have been surprised in this case by two intervening acts, Congressional enactment of the § 1122 amendments to the Social Security Act and the interest rate increases. These could have prevented HBC from beginning construction until 1977. Accordingly, we reject the appellants' contentions that these occurrences were intervening causes of the damages and that a jury could not find that the damages flowed from the alleged antitrust violations.[6]

The concept of "antitrust injury" is derived from the decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick*, a company manufacturing and supplying bowling equipment acquired several bowling centers. A number of competing bowling centers brought an action against the manufacturer and supplier alleging a violation of § 7 of the Clayton Act. The injuries

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[6] This ruling, of course, does not relieve HBC of the burden of proving that appellants' attempts to delay construction of the new hospital were violative of the Sherman Act under the rule of reason.

claimed by the plaintiffs were lost profits that would have been realized by the plaintiffs if the manufacturer had not purchased the bowling centers but instead had allowed them to go out of business as the plaintiffs alleged they would.

What made the acquisition of the bowling centers arguably unlawful under the antitrust laws was the manufacturer's potential to use its admittedly overpowering financial resources to undercut the competing bowling center, a so-called "deep pocket" offense. Since plaintiffs had no evidence that the manufacturer and supplier had attempted to undercut them, plaintiffs could prove no damages flowing from the alleged illegality and were left to assert loss of profits that would have accrued to their benefit had the competing bowling centers been allowed to go out of business.

The Supreme Court found these alleged lost profits were not injury of the type that the violated antitrust law was designed to prevent and they were not damages of the type that the claimed violations would be likely to cause.[7] Appellants, in the instant appeal, assert that the damages HBC seeks in this action flow from enactment of § 1122 and from rising interest rates rather than from the alleged unlawful acts of appellants. We reject this argument. As was noted in the above discussion of proximate cause, delay in HBC's ability to enter the Raleigh hospital market is precisely the type of injury that the alleged "allocation of the market" and "refusal to deal" were likely to cause and appellants cannot escape liability merely because the injurious delay was compounded by

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[7] See Chief Judge Winter's discussion of the ruling in *Brunswick* in *Lee-Moore Oil Company v. Union Oil Company of California*, 599 F.2d 1299, 1302-1304 (4th Cir. 1979).

enactment of the § 1122 amendments and rising interest rates.

V

Since it is not affected by our ruling on the rule of reason and, thus, will not be addressed again on remand, we also dispose of the issue of HBC's preparedness to enter the Raleigh area hospital market. Appellants contend that the record supports a finding that HBC could not have obtained the approval of North Carolina authorities for its 6.88 acre "Tucker" site and that HBC was not as a matter of law prepared to enter the Raleigh area hospital market in 1972. Entrance of judgment notwithstanding the verdict is not proper since the issue was hotly contested at trial, with considerable evidence being introduced to support both positions. We also believe that the question of whether to send a special interrogatory to the jury on this issue was within the discretion of the trial judge. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976).

VI

Although the issue was not raised in the briefs, at argument, HBC asserted the verdict below should be sustained even assuming the rule of reason applies to its § 1 claims. In support of this assertion HBC argued that any error in applying a *per se* rule to its § 1 cause of action did not render objectionable its recovery under its § 2 causes of action.

Section 2 of the Sherman Act supports three distinct causes of action: (1) monopolization, (2) attempt to monopolize and (3) conspiracy to monopolize. HBC sought recovery under the latter two causes of action,

attempt and conspiracy. The district court correctly charged that an element of both of these offenses is specific intent to monopolize. *American Football League v. National Football League*, 205 F.Supp. 60, 64-65 (D.Md. 1962), *aff'd* 323 F.2d 124 (4th Cir. 1963).

Proof that the transactions in question were primarily motivated by legitimate business purposes rather than by specific intent to monopolize is a defense to both attempt to monopolize and conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953), and *American Football League*, *supra* at 132-33.

A literal application of the legitimate business purposes defense, developed in more traditional commercial market cases, does not, however, readily lend itself to application by a jury to health care planners. The analogous defense, and the one appellants should be permitted to pursue below, is one like that we have formulated for § 1 claims. Proof that the defendants in this action were primarily motivated by intent to avoid a "needless" duplication of health care resources would be a defense to HBC's § 2 claims. In the instant case the district court charged the jury that "it is no defense to a . . . conspiracy to monopolize and an attempt to monopolize that the acts complained of may have been undertaken with what defendants believe to be proper motives. A claim of good motives cannot justify or excuse a violation of the antitrust laws, and would be no defense in this case."

We believe the charge is clearly erroneous in light of the defendants' right to prove that they were motivated by intent to avoid "needless" duplication rather than specific intent to monopolize. Defendants made a timely objection to this charge and argued on brief that the § 2 as well as

the § 1 causes of action should be reversed. Plaintiffs § 2 causes of action, therefore, are reversed.

Accordingly, judgment for HBC on appellants' counterclaims is affirmed; judgment for HBC on its claims under §§ 1 and 2 of the Sherman Act is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

(Filed January 7, 1983, U.S. Court of Appeals Fourth Circuit)

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1134

HOSPITAL BUILDING COMPANY,
Appellee,

versus

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; RICHARD URQUHART, JR.,
Appellants,

NORTH CAROLINA HOSPITAL ASSOCIATION,
Amicus Curiae.

ORDER

Upon consideration of the appellee's petition for rehearing en banc and the appellants' motion to assess costs on appeal against appellee;

No judge having requested a poll on the suggestion for rehearing en banc, it is ADJUDGED and ORDERED that the petition for rehearing and the motion for costs are both DENIED.

Entered at the direction of Judge Chapman for a panel consisting of Judge Hall, Judge Phillips and Judge Chapman.

For The Court,

/s/ WILLIAM K. SLATE, II
CLERK

APPENDIX C

(Filed August 18, 1980, J. Rich Leonard, Clerk, U.S. District Court, Eastern North Carolina)

United States District Court

FOR THE

Eastern District of North Carolina

CIVIL ACTION FILE NO. 4048

HOSPITAL BUILDING COMPANY *vs.* TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES and RICHARD URQUHART, JR.	JUDGMENT

This action came on for trial before the Court and a jury, Honorable Herbert N. Maletz, United States Customs Judge Presiding by designation, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff Hospital Building Company recover of defendants Trustees of Rex Hospital, Joseph Barnes and Richard Urquhart, Jr., jointly and severally, treble damages in the sum of Seven Million Three Hundred Twenty Thousand Ninety and NO/100 Dollars ($7,320,090.00), plus costs of suit including reasonable attorneys' fees to be determined by the court at a later date.

It is further adjudged that defendant Trustees of Rex Hospital recover nothing on its counterclaims for abuse of legal process and libel and that these counterclaims be and hereby are dismissed.

Dated at Raleigh, North Carolina, this 18th day of August, 1980.

/s/ J. Rich Leonard
Clerk of Court
J. Rich Leonard, at the direction
of Judge Herbert N. Maletz

I certify the foregoing to be a true
and correct copy of the original.
J. Rich Leonard, Clerk
United States District Court
Eastern District of North Carolina

By /s/ Susan Dean
Deputy Clerk

APPENDIX D

EXCERPTS FROM PETITION FOR CERTIORARI IN *NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER V. BLUE CROSS OF KANSAS CITY*

C. If allowed to stand, the decision below will impair the effect of recent decisions of this Court subjecting the health care industry to antitrust scrutiny.

Until very recently, health care providers and insurers were largely immune from the federal antitrust laws because of various legal hurdles which effectively shielded their conduct from antitrust scrutiny. *See, e.g.*, C. Havighurst, "Professional Restraints on Innovation in Health Care Financing," 1978 *Duke L.J.* 303, 343 (1978). Recent decisions of this Court have, however, greatly diminished these barriers.

First, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, and *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, this Court rejected the contention that the "learned professions" are exempt from the requirements of the antitrust laws.

Second, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum Co.*, 445 U.S. 97, and predecessor cases,[14] this Court significantly narrowed the *Parker* v. *Brown*[15] "state action" exemption, which now provides only a limited shield for private actions ostensibly taken by health professionals and third party insurers in response to state law and regulatory regimes. *See, e.g., Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d

[14] *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579; *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773. *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350; *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U.S. 96.

[15] 317 U.S. 341.

530, 549-50 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075, 1079 (4th Cir. 1976), *cert. denied*, 430 U.S. 922. Certainly after *Midcal* it is clear that private acts undertaken without state supervision are not exempt from antitrust scrutiny.

Third, and with special relevance to the health care industry, are this Court's recent decisions dealing with the scope of interstate commerce to which Section 1 of the Sherman Act (15 U.S.C. § 1) applies. For some time, hospitals and other health care providers have been able to contend successfully that the delivery of health services was a local activity, and, hence, not subject to the antitrust laws.[16] In *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, however, this Court significantly broadened the scope of interstate commerce in antitrust scrutiny of the health professions and other health care providers. The scope of interstate commerce under the Sherman Act was further extended by this Court's more recent decision in *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232.

The decision below would effectively undo this Court's decision in *Rex Hospital*. Like the present case, *Rex Hospital* involved private anticompetitive conduct ostensibly undertaken pursuant to health planning legislation. Under the present decision, the very conduct in *Rex Hospital* ultimately held on remand to have been in violation of

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[16] *See, e.g.*, *Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1199, 1210 (E.D. Mich. 1973) (no interstate commerce in suit by private hospitals against Blue Cross for revocation of participating hospital contract because "sale of hospital care is personal and localized in nature").

the antitrust laws,[17] would be shielded from antitrust scrutiny—this time not by the statutory interstate commerce hurdle but rather by a much more amorphous "blanket" exemption tenuously based on the Planning Act.

The decision below would also significantly limit the impact of this Court's decision in *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205. In the past, antitrust suits against Blue Cross/Blue Shield were often held to be barred by Section 2 of the McCarran-Ferguson Act (15 U.S.C. § 1012), which exempts the "business of insurance" from the Sherman Act if such business is regulated by state law.[18] In *Royal Drug*, this Court, noting that "exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences" (440 U.S. at 232, n. 40), concluded that pharmacy provider agreements were not within the McCarran-Ferguson Act exemption. Yet, the court below has rendered such agreements and all their surrounding circumstances totally exempt from antitrust scrutiny. The impact of this decision on other related McCarran-Ferguson Act issues, such as those involved in *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir.

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[17] On August 18, 1980, a judgment for plaintiff in the amount of $7,320,090 was entered on a jury verdict in the *Rex Hospital* case. Post-judgment motions have been filed by defendants.

[18] *See, e.g., Travelers Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093; *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 434 U.S. 860; *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 431 F. Supp. 5 (E.D. Pa. 1975), *aff'd per curiam*, 557 F.2d 1001 (3d Cir. 1976). *See also St. Bernard Hospital* v. *Hospital Service Ass'n of New Orleans*, 618 F.2d 1140 (5th Cir. 1980) (reversing lower court opinion holding participating hospital agreements immune from antitrust scrutiny in light of *Royal Drug*).

1980), is less clear, but is not likely to be favorable to antitrust plaintiffs.

In short, the recent decisions of this Court have uniformly had the effect of narrowing the traditional antitrust exemptions applicable to health care providers and insurers.[19] What the opinion below does is to create a new blanket "Planning Act exemption" at least as broad as the antitrust exemptions traditionally used by health care providers and insurers (such as Blue Cross) to shield their conduct from antitrust scrutiny. Unless this Court's recent decisions are to be severely undercut, review of the decision below is required.

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[19] This has been consistent with the general inclination of this Court to read antitrust exemptions narrowly and to require a clear showing of Congressional intent before finding conduct exempt from antitrust scrutiny. *See, e.g., St. Paul Fire and Marine Ins. Co.* v. *Barry*, 438 U.S. 531; *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816.

APPENDIX E

EXCERPTS FROM THE RECORD OF THE DISTRICT COURT PROCEEDING

Plaintiff's Claims Under Section 2 of the Sherman Act

We next turn to plaintiff's claims that in violation of Section 2 of the Sherman Antitrust Act, the defendants have attempted to monopolize and have conspired to monopolize the market for medical-surgical hospital services in the Raleigh area. These are two separate claims.

"Monopolize" Defined

"Monopolize" means the acquisition of power to exclude actual or potential competitors from the market. It does not necessarily mean that one business controls an entire market. A monopoly may be shared between two or more businesses.

Essential Elements of Claim for Attempted Monopolization

In order to sustain an action against defendant Rex Hospital under Section 2 of the Sherman Act for attempted monopolization, plaintiff must prove by a preponderance of the evidence each of the following elements:

First, that the defendant Rex Hospital had a specific intent to monopolize interstate trade and commerce in medical-surgical hospital services in the Raleigh area;

Second, that one or more of the acts claimed by plaintiff to have been done was wrongful, and was in furtherance of that intent, even though insufficient actually to produce the intended monopoly;

Third, that both elements—the intent and the act—must appear and must together result in a reasonable probability that monopolization will sooner or later occur;

Fourth, that the attempted monopolization so established was the proximate cause of damage to the business or property of plaintiff.

"Attempt to Monopolize" Defined

The term "attempt to monopolize," as used in the Federal antitrust laws, involves two essential elements: (1) an intent to monopolize, and (2) some act done in furtherance of that intent, even though insufficient actually to produce the intended monopoly. In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a reasonable probability that monopolization will sooner or later occur.

However, in order to constitute an "attempt to monopolize," it is not necessary that the acts have actually resulted in monopolization or the exclusion of competitors.

Intent Defined

"Purpose or intent" means the state of mind with which one acts. A person is usually held to intend to do everything such person does in fact do. It is also reasonable to infer that a person intends all the natural and probable consequences of his acts.

Intent—Proof of

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

Essential Elements of Claim for Conspiracy to Monopolize

There are four essential elements which the plaintiff must prove in order to establish its claim that defendants conspired with others to monopolize within the meaning of Section 2 of the Sherman Act:

1. That there was a conspiracy between defendants and others to monopolize an appreciable amount of identifiable interstate commerce in the furnishing of medical-surgical hospital services in the Raleigh area;

2. That if so, both the defendant and the others entered into such conspiracy with the specific intent to monopolize that commerce;

3. That one or more of the acts claimed by the plaintiff in its complaint was done; and was in furtherance of such conspiracy to monopolize;

4. That if so, the conspiracy so established was the proximate cause of damage to the business or property of plaintiff.

"Conspiracy to Monopolize" Defined

A "conspiracy to monopolize" means an agreement or understanding between two or more parties to acquire the power to exclude actual or potential competitors from the market.

Ignorance of Antitrust Laws or Good Motives No Defense

The fact that the defendants may have believed, in good faith, that what was being done was lawful is not a

defense in this case. Every person is charged with knowing what the law forbids.

Similarly, it is no defense to a conspiracy in restraint of trade, conspiracy to monopolize and an attempt to monopolize that the acts complained of may have been undertaken with what defendants believe to be proper motives. A claim of good motives cannot justify or excuse a violation of the antitrust laws, and would be no defense in this case.

APPENDIX F

Federal Statutes Which Involve Planning or Which Regulate Market Entry*

	Statutory Provision	Common Name Or Heading	Description
1.	7 U.S.C. §§3701-3703 (Supp. V 1981)	Agricultural Sub-terminal Facilities Act of 1980.	Authorizes grants to assist states in the development of plans for sub-terminal facilities.
2.	10 U.S.C. §2391 (Supp. V 1981)	Military base reuse studies and community planning assistance.	Authorizes grants in connection with planning the closure of military installations and related community adjustments.
3.	12 U.S.C. §27 (1976 & Supp. V 1981)	Certificate of authority to commence banking.	Regulates entry into banking.
4.	15 U.S.C. §717f (1976 and Supp. V 1981)	Construction, extension, or abandonment of [natural gas] facilities.	Predicates transportation or sale of natural gas upon issuance of a certificate of public convenience and necessity by the Federal Energy Regulatory Commission.

*In addition to these provisions, research on LEXIS reveals 216 statutory subsections pertaining to public health and welfare planning.

Statutory Provision	Common Name Or Heading	Description
5. 16 U.S.C. §797(e) (1976)	Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc. [under the Federal Power Act.]	Provides for the issuance of licenses to persons constructing or operating dams, reservoirs, or other project works related to the transmission of hydroelectric power.
6. 16 U.S.C. §1225 (1976)	State consideration of protection and restoration of estuaries in State comprehensive planning and proposals for financial assistance under certain Federal laws; grants: terms and conditions, prohibition against disposition of lands without approval of the Secretary.	Relates to the protection and restoration of estuaries in connection with state and local governments' comprehensive planning and proposals for financial assistance under certain federal statutes.

Statutory Provision	Common Name Or Heading	Description
7. 16 U.S.C. §2107 (Supp. V 1981)	Financial, technical, and related assistance to states [under the Cooperative Forestry Assistance Act of 1978].	Authorizes the Secretary of Agriculture to make funds available to non-federal landowners in connection with certain forestry assistance programs and requires the Secretary to use forest resources planning committees at the national and state levels in order to implement a technology program.
8. 20 U.S.C. §1016 (Supp. V 1981)	Federal discretionary grants [pertaining to continuing post secondary education program and planning].	Provides for the issuance of grants to public and private institutions and organizations after the state entity responsible for the comprehensive planning of certain educational programs has had an opportunity to comment on the relationship of the proposed grant to such planning.
9. 23 U.S.C. §134 (1976 & Supp. V 1981)	Transportation planning in certain urban areas.	Provides for the development of transportation plans and programs and financial assistance in connection with the development of coordinated transportation planning.

	Statutory Provision	Common Name Or Heading	Description
10.	23 U.S.C. §307 (1976 & Supp. V 1981)	Research and planning [in connection with federal-aid highways.]	Authorizes the Secretary of Transportation to (1) engage in transportation research in cooperation with, *inter alia*, profit or non-profit corporations and (2) make available funds for the planning of future highway programs.
11.	29 U.S.C. §771 (1976 & Supp. V 1981)	Grants for construction of rehabilitation facilities, staffing, and planning assistance.	Authorizes grants to public or nonprofit agencies, institutions, or organizations to assist them in meeting the cost of planning rehabilitation facilities; makes such grants dependent upon the pertinent state agency's approval of the application.
12.	29 U.S.C. §819 (Supp. V 1981)	Prime sponsor's planning council.	Requires designated units of local government to establish a planning council to participate in the development of a comprehensive employment and training plan and requires the planning council to take into consideration any comments and recommendations of a private industry council.

	Statutory Provision	Common Name Or Heading	Description
13.	38 U.S.C. §§5051-5057 (1976 & Supp. V 1981)	Sharing Of Medical Facilities, Equipment, And Information.	Authorizes the Administrator of Veterans' Affairs to enter into agreements with medical schools, hospitals, and research centers in order to share medical techniques and information; authorizes grants in connection with planning and carrying out such agreements.
14.	43 U.S.C. §§422a-422*l* (1976 & Supp. IV 1980)	Construction Of Small Projects [under the Federal Reclamation Laws.]	Provides federal assistance, for purposes of planning and developing water resource projects, to organizations which have the capacity to contract with the United States under the Federal Reclamation Laws.
15.	46 U.S.C. §841b (1976)	Licensing of ocean freight forwarders.	Regulates entry into the business of ocean freight forwarding.
16.	47 U.S.C. §214 (1976)	Extension of lines or discontinuance of service; certificate of public convenience and necessity.	Regulates telephone and telegraph common carriers; requires any carrier that is constructing or extending a line to obtain from the FCC a certificate that the present or future public convenience and necessity require or will require that line.

	Statutory Provision	Common Name Or Heading	Description
17.	47 U.S.C. §301 (1976)	License for radio communication or transmission of energy.	Authorizes the FCC to license and otherwise regulate—as public convenience, interest or necessity requires—the transmission of energy or communications or signals by radio.
18.	49 U.S.C. §1607 (Supp. IV 1980)	Long-range planning and technical studies.	Authorizes grants to states and local public bodies and agencies for the planning and evaluation of public transportation projects; requires the development of transportation plans programs which "encourage to the maximum extent feasible the participation of private enterprise."
19.	49 U.S.C. §1612 (1976 & Supp. IV 1980)	Planning and design of mass transportation facilities to meet special needs of the elderly and the handicapped.	Authorizes grants and loans to state and local governmental bodies and agencies and to private non-profit corporations for the planning and provision of certain transportation services.

	Statutory Provision	Common Name Or Heading	Description
20.	49 U.S.C. §1713 (1976 & Supp. IV 1980)	Planning grants.	Authorizes grants for the planning of airport systems to certain agencies authorized by the laws of states or political subdivisions of states.
21.	49 U.S.C. §10901 (Supp. IV 1980)	Authorizing construction and operation of railroad lines.	Predicates the construction and operation of a new railroad line upon the issuance of a certificate of public convenience and necessity from the ICC.
22.	49 U.S.C. §10922 (Supp. IV 1980)	Certificates of motor and water common carriers.	Regulates transportation by motor common carrier or water common carrier by requiring that a carrier obtain an authorizing certificate from the ICC.
23.	49 U.S.C. §10923 (Supp. IV 1980)	Permits of motor and water contract carriers and freight forwarders.	Provides for the regulation of transportation by motor contract carriers or water contract carriers and of services by freight forwarders by requiring a person who seeks to provide such transportation to obtain an authorizing permit from the ICC.

NO. 82-1633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL,
a Corporation; JOSEPH BARNES;
and RICHARD URQUHART, JR.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER HOSPITAL BUILDING COMPANY

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER HOSPITAL BUILDING COMPANY

Petitioner Hospital Building Company ("petitioner") submits this supplemental brief (i) in order to call the Court's attention to a recent decision of the United States Court of Appeals for the Fifth Circuit pursuant to Supreme Court Rule 22.6, and (ii) in response to the Supplemental Brief of Respondents in opposition to the United States' brief as *amicus curiae.*

I. THE FIFTH CIRCUIT'S RECENT OPINION IN *ST. BERNARD GENERAL HOSPITAL* CREATES A CONFLICT BETWEEN THE CIRCUITS.

Pursuant to Supreme Court Rule 22.6, petitioner submits as supplemental authority the Fifth Circuit's decision in *St. Bernard General Hospital v. Hospital Service Association of New Orleans*, 712 F.2d 978 (5th Cir. 1983). *See* Appendix A to this supplemental brief. In *St. Bernard General Hospital*, the Fifth Circuit explicitly rejected the Fourth Circuit's notion that there can be justifications, in the form of affirmative defenses, for acts that constitute *per se* violations of the antitrust laws. Specifically, the Fifth Circuit stated:

> The Court [in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982)] acknowledged the possibility that certain price fixing schemes, perhaps even the Maricopa foundation's, could be beneficial rather than harmful to the public. Yet the [*Maricopa*] opinion declares boldly that pro-competitive justifications are no defense to per se price fixing violations.
>
> * * *
>
> The only readily-apparent escape [where anti-competitive effects of a particular agreement were shown] would be an affirmative defense that the restrictions were reasonable, or were the least restrictive methods to achieve a legitimate business goal. We cannot make such a finding until the defendant presents its case. *Even that evidence, were it to be presented, would of course not counter a per se violation.*

712 F.2d at 986, 988; Appendix A at 15a, 20a. (Emphasis supplied.) Certiorari should be granted to resolve this conflict among the circuits.

II. RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO THE UNITED STATES' BRIEF AS *AMICUS CURIAE* MISSTATES THE FACTS AND THE LAW.

1. Contrary to respondents' assertion, liability under the antitrust laws was not imposed on them for their "planning" activities. While, as petitioner has pointed out, no statute encouraged—much less mandated—respondents' planning activities (Petition at 15), that is not the critical point. Antitrust liability was imposed on respondents because they implemented their so-called plans through a collective refusal to deal, an allocation of hospital service markets, and an allocation of patient markets. Thus, what respondents really argue is that their efforts to regulate and, indeed, to control the market for hospital services in Raleigh were encouraged or authorized by the statutes they have cited. (Supplemental Brief of Respondents at 4, n.3) Those statutes, however, in no way mandated or even contemplated the *implementation* of "planning" activities by competing hospitals to the exclusion of another competitor. Respondents—and the Fourth Circuit—cannot, therefore, rely on *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), to "craft" a Congressional mandate for industry self-regulation, that would otherwise be a *per se* violation of the antitrust laws. (Supplemental Brief of Respondents at 6, n.6)

2. Respondents contend that the Fourth Circuit's decision rests on *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981). In *National Gerimedical*, this Court *rejected* the contention that certain activities based upon a statute that specifically contemplated health planning and provided certain penalties in the absence thereof were implicitly exempt from the antitrust laws. Thus, it is difficult to see how *National Gerimedical* can possibly stand for the

proposition that perpetrators of *per se* violations of the antitrust laws are exempt from liability under those laws.

3. Respondents erroneously assert that the Fourth Circuit premised its decision on an "exemption" from the antitrust laws. Precisely the contrary is true. The Fourth Circuit held that the antitrust laws were applicable to the conduct of respondents, but that respondents should be provided with an escape hatch by way of a "special rule of reason" affirmative defense which would permit them to demonstrate that their market allocation scheme and refusal to deal were motivated by good purposes. This is precisely the reason why the Fourth Circuit's decision is so pernicious. The effect of the Fourth Circuit's decision, as demonstrated by petitioner (Petition at 22-25), will be to provide substantially all perpetrators of *per se* violations of the antitrust laws with an excuse for their clearly anti-competitive conduct—a conclusion, which (as discussed above) was rejected by the Fifth Circuit in *St. Bernard General Hospital.*

4. Respondents incorrectly assert that petitioner did not seek damages based on "exclusionary conduct involving Blue Cross." (Supplemental Brief of Respondents at 2-3) In fact, the "larger plan" in which the jury found the "defendant hospital" had engaged was a blatantly anti-competitive conspiracy implemented by respondents through their control of Blue Cross that called for Blue Cross to refuse to deal with petitioner on a fair and equitable basis. (Petition at 7-8; Reply Brief for Petitioner at 4-5, n.4) *See St. Bernard General Hospital,* 712 F.2d at 987; Appendix A at 18a: "A refusal to deal on fair and equal terms can be a prohibited refusal to deal under section 1 of the Sherman Act."

CONCLUSION

For the reasons stated herein, in petitioner's earlier briefs and in the brief of the United States as *amicus curiae*, the Petition should be granted in No. 82-1633.

Respectfully submitted,

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Dated: September 30, 1983

APPENDIX A

ST. BERNARD GENERAL HOSPITAL, INC.,
Plaintiff-Appellant,

v.

HOSPITAL SERVICE ASSOCIATION
OF NEW ORLEANS, INC.,
Defendant-Appellee.

No. 82-3055.

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1983.

Before GEE, GARZA and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

St. Bernard General Hospital, Inc. (St. Bernard), a small, for-profit hospital in the New Orleans area, brought this antitrust suit, claiming restraint of trade by the Hospital Service Association of New Orleans, Inc.,[1] the area Blue Cross licensee. 15 U.S.C. §§ 1, 15. The district court ordered an involuntary dismissal at the close of the plaintiff's case, Fed.R.Civ.P. 41(b). We reverse and remand for further proceedings.

Procedural History

This is the third appearance of this case before our Court. The case was filed originally in September, 1971. In March of 1974, the district court rendered summary judgment in favor of the Blue Cross licensee on the ground that there was no effect on interstate commerce

[1] Hereinafter referred to as HSA or, for clarity's sake, Blue Cross.

shown in the case. This Circuit reversed and remanded, 510 F.2d 1121 (5th Cir.1975). On remand, the district court dismissed the suit on the basis of the "business of insurance" exception to the antitrust laws contained in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. This Court again reversed and remanded, 618 F.2d 1140 (5th Cir.1980), finding that the actions of Blue Cross at question in this case did not fall into the "business of insurance" exception.

While this case was pending, other New Orleans area hospitals filed similar antitrust claims against Blue Cross. These other cases were all consolidated for trial, and discovery was underway at the time of the second remand in this case. St. Bernard moved to consolidate this action with the other cases, but the district court denied the motion both before and at the start of St. Bernard's scheduled trial. Further, the district judge, whose docket included both this case and the other consolidated cases, applied a protective order to much of the discovery in the other cases, so that St. Bernard was not permitted to avail itself of the fruits of discovery in the other consolidated cases.

This case was set for trial on December 21, 1981. On November 4, 1981, the judge held a pretrial conference and found that St. Bernard had not yet completed its preparations for trial or located a key witness. It also had not yet fully informed its opponent of the theoretical underpinnings of its antitrust charges. The judge admonished St. Bernard to complete trial preparations or risk the consequences. The case went to trial as scheduled on December 21.

St. Bernard presented four witnesses at trial: Edmond Vallon, president of Hospital Service Association of New

Orleans, Inc. (HSA) during the years in question; Dr. Emile Bertucci, Jr., the chief stockholder and medical director of the hospital; Emile Bertucci, III, an administrator in the hospital toward the end of the years in question; and, Harold Pittman, administrator of the hospital during previous years. These four witnesses testified as to the standard practices of St. Bernard and Blue Cross and the nature of the relationship between the two. No witness testified on the issue of damages, because the parties stipulated before trial that the amount at issue was $147,610.70.

At the end of the plaintiff's case, HSA moved for an involuntary dismissal of the case, pursuant to Rule 41(b), Fed.R.Civ.P. The district court granted the motion, making the following findings:

No showing of effect on interstate commerce;

Hospital payments in the vast majority of cases would have been the same to St. Bernard regardless of the complained-of conduct, thus negating antitrust injury;

No merit to the substance of the antitrust charges.[2]

St. Bernard appeals from this dismissal. It asks, first, that we find evidence of a per se violation of section one of the Sherman Act under the evidence presented and remand for a full trial, and second, that we grant the earlier-denied motion to consolidate this case with the similar cases now preparing for trial in the same court.

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[2] In finding no merit to the substantive antitrust charges, the district court found that there was no sinister or anticompetitive motive on the part of HSA to hurt St. Bernard or impede competition. Furthermore, the court found no scintilla of evidence that there was any economic coercion on the part of HSA, either implicit or explicit. The details of the district court's substantive holdings are discussed later in this opinion.

Blue Cross and the New Orleans Hospital Market

We begin by examining the structure of the New Orleans hospital market and the general applicability of the antitrust laws. Blue Cross is a major health care insurer in the country. In New Orleans, the licensee for Blue Cross insures approximately 300,000 people, which is about 38% of those with health care insurance and 30% of the general population. Blue Cross came to the New Orleans area in the 1930's in the form of a private sector, nonprofit corporation founded by four area nonprofit hospitals. These four hospitals referred to themselves as the "participating hospitals." The participating hospitals agreed to run the Blue Cross program on behalf of subscribers and to underwrite any financial shortfalls from operations. Operating surpluses, evidently, were to be rechanneled into Blue Cross programs.

Blue Cross grew and prospered in the succeeding years. Only once were the participating hospitals asked to cover an operating deficit. This was in 1937, when the four participating hospitals collectively covered a $13,000 shortfall. In most years, Blue Cross has enjoyed an operating surplus.

The present suit concerns only the years 1969 through 1972.[3] During the period relevant to this lawsuit, there were nine participating hospitals, all nonprofit facilities in the New Orleans area. The Blue Cross board of directors was composed of 31 members. Each of the nine participating hospitals appointed two representatives to the board,

[3] St. Bernard also claims antitrust injury in the year 1966, but this claim is barred by the statute of limitations. It must also be noted that St. Bernard Hospital is no longer in business. Its successor in operations is the De La Ronde Hospital, also a for-profit facility. The successor hospital is, unlike St. Bernard, a participating hospital in the Blue Cross organization.

and the remaining thirteen at-large members were elected by the eighteen hospital representatives. In this way, the participating hospitals enjoyed effective control of the Blue Cross board, both by having a simple majority on the board and by selecting all the "outside" directors.[4]

Blue Cross sells hospitalization insurance to individuals and groups under a variety of programs. Some policies pay only basic benefits, while others provide more comprehensive coverage. The basic policies, for example, will not pay for services performed at a hospital without some form of Blue Cross affiliation.[5]

The various Blue Cross policies do not reimburse all the area hospitals on an identical basis. Blue Cross distinguishes among three categories of hospitals for reimbursement purposes. At one extreme are the hospitals without any Blue Cross affiliation, known as the "non-affiliated hospitals." These hospitals receive less from Blue Cross under most subscriber policies than an affiliated hospital would receive for identical services. The patient typically is expected to make up the difference, making it less attractive both for the hospital and the patient for Blue Cross members to be treated in non-affiliated hospitals. Non-affiliated hospitals are not involved in the instant case.

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[4] The Blue Cross by-laws require that outside directors be subscribers or members of Blue Cross. This requirement apparently is easy to meet, since Blue Cross underwrites approximately 38% of all health insurance in the area. The record shows that many of the "outside" directors have been not only subscribers to Blue Cross, but board members of the participating hospitals as well, thus effectively strengthening the ties between the participating hospitals and Blue Cross.

[5] Several large employers have negotiated their own Blue Cross master policies, however, containing special provisions. Many of these large-employer policies will provide reimbursement for services performed at non-Blue Cross affiliated hospitals.

At the opposite end of the spectrum are nine affiliated hospitals known as the "participating hospitals." These nine hospitals, which appoint representatives to the board of Blue Cross, are promised reimbursement in full for all care provided to all Blue Cross subscribers, almost without limitation. All nine are nonprofit institutions and are accredited by the Joint Commission on Accreditation of Hospitals (JCAH).

The third group is an intermediate category of affiliated hospitals called "contracting hospitals." Contracting hospitals for the most part are for-profit institutions.[6] Contracting hospitals need not be JCAH-approved. The contracting hospitals have entered into agreements with Blue Cross, stating that the hospital will provide all needed services to all Blue Cross subscribers desiring admission, without regard to the type of coverage or policy involved. Blue Cross, in return, promises to pay the hospital's usual, customary, and reasonable (UCR) charges.[7]

Unlike the arrangement with the participating hospitals, however, the agreement with the contracting hospitals sets an upper limit on the reimbursable amount. Contracting hospitals are initially paid 100% of the UCR charges, the same reimbursement that Blue Cross would make to a participating hospital. At the end of each year, however, Blue Cross makes an accounting of all hospital-

[6] Until recently, only nonprofit hospitals could be "participating hospitals" within the Blue Cross system. After this suit was filed, however, Blue Cross offered participating status to additional hospitals, including St. Bernard, a for-profit, contracting hospital. The De La Ronde Hospital, the successor institution to St. Bernard, and also a for-profit facility, eventually accepted this invitation and is now a Blue Cross participating hospital. This case, however, involves years when St. Bernard was not accepted as a participating hospital.

[7] Different policy types, however, provide for different repayment schedules that might affect the actual payment Blue Cross makes to the contracting hospital.

ization payments and may demand a partial refund from the contracting hospitals. The contracting hospital may not keep more than the average amount paid to a participating hospital under a like policy for similar illness or a comparable length of stay. Contracting hospitals whose billings do not exceed the average billings of participating hospitals (after adjusting for length of stay, diagnosis, and policy type) owe no rebate to Blue Cross. However, those hospitals whose average charges exceed those of the participating hospitals, after these adjustments, must make a refund of the excess to Blue Cross. Thus, whether a contracting hospital owes a refund to Blue Cross at the end of the year depends on whether that hospital has been able to contain costs at or beneath the average charges of the participating hospitals. There is no comparable refund requirement imposed upon a participating hospital.

During the years in question, 1969-1972, St. Bernard Hospital was one of the Blue Cross contracting hospitals. It was a for-profit facility, and was not JCAH approved (although it was fully licensed by the state). It was a 39 bed hospital affiliated with a medical clinic housed in the same building. Dr. Emile Bertucci, Jr., and his family owned the stock of the hospital. Back in 1961, shortly after Dr. Bertucci bought the hospital, St. Bernard entered into its contracting hospital status with Blue Cross. The contract provided for full payment on all types of patient policies, subject to the cap of the average charges of the participating hospitals.[8] In many years, St. Bernard's Blue Cross billings were within the limit im-

[8] The full payment provision became effective on April 1, 1962. During 1961, Blue Cross paid St. Bernard only 98% of its UCR payments, and in 1960 the figure was 97%. The cap on reimbursement, based on payments to the participating hospitals, has always been in effect.

posed, and St. Bernard owed nothing back to Blue Cross. In five of the years, however, St. Bernard exceeded the cap. The first such year was 1966, when St. Bernard refunded $843.04 to Blue Cross. The statute of limitations bars any antitrust claim for 1966. In four later years, 1969-72, St. Bernard made refunds totaling $147,610.70 to Blue Cross,[9] representing approximately 13 percent of total Blue Cross payments.[10]

It is this refund that is alleged to support the antitrust claims before us. St. Bernard urges that Blue Cross has been favoring the participating hospitals that sit on the board at the expense of St. Bernard and the other contracting hospitals. When St. Bernard entered into its agreements with Blue Cross, Blue Cross prohibited St. Bernard from joining as a participating hospital. St. Bernard claims that since Blue Cross would neither offer St. Bernard status as a participating hospital nor reimburse it equally with the participating hospitals, Blue Cross discriminated against it in violation of the antitrust laws. With this overview in mind, we turn to the substance of the antitrust claims in this case.

Sherman Act Applicability

A. Standard of Review.

The question before us is not whether there was either in fact or in law an actual violation of the antitrust laws. The question is the more limited one of whether St.

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[9] St. Bernard was not asked to make any Blue Cross rebate during 1967 or 1968. In 1969, it refunded $20,107.04 to Blue Cross. In 1970, it refunded $43,219.34. In 1971, the sum was $33,096.72, and in 1972, $51,187.60. The total for the years in question, 1969-1972, is $147,-610.70, as stipulated by the parties.

[10] Blue Cross payments to St. Bernard, which totalled $1,133,-476.63 over the four years at issue, constituted approximately one-third of St. Bernard's total income. In 1971, a typical year, 567 of the hospital's 1,588 admissions were Blue Cross cases.

Bernard's evidence could support a theory of antitrust recovery if HSA fails to rebut that evidence effectively. We are asked only to decide if the district court's dismissal was proper.

The district court below dismissed this case under Fed. R.Civ.P. 41(b). Rule 41(b) allows a judge to dismiss a case with prejudice at the end of a plaintiff's evidence, if the case is being tried without a jury. In a jury trial, by contrast, the proper motion at the end of the plaintiff's case would be a motion for directed verdict, Fed.R.Civ.P. 50. The standard for granting the motion, hence our standard of review on appeal, differs slightly between the two.

On a motion for directed verdict in a jury trial, the district judge is to look at the evidence in the light most favorable to the nonmoving party, including all reasonable inferences and accepting conflicts in the evidence as favoring the nonmoving party. Only if the evidence, viewed in that light, fails to establish a legally-cognizable claim is the judge to enter a directed verdict. *Excel Handbag Co. v. Edison Bros. Stores, Inc.*, 630 F.2d 379, 384 (5th Cir.1980).

In a case tried to the court, by contrast, the judge commands the inquiries into facts as well as law. In considering a motion for involuntary dismissal under Rule 41(b), therefore, the district court is not limited to a narrow viewing of the facts, but rather must adjudge the evidence and weigh the credibility of witnesses. *Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir.1970) (en banc). The judge may use his or her skills as factfinder in ruling on the merits of the claims at the close of the plaintiff's case. This is a power denied the judge in a trial

where a jury sits as ultimate factfinder.[11]

Since a Rule 41(b) motion permits a judge to consider all inferences, favorable and unfavorable, our standard of review on appeal must differ slightly from that applied to a Rule 50 directed verdict. We must consider not only if the district court erred in the law, but also whether its conclusions of fact are supported by substantial credible evidence and are not clearly erroneous. *Id.* We may not, however, substitute our interpretation of the evidence for that of the district judge. With these standards in mind, we begin by examining the conclusions of the district court.[12]

B. The District Court's Findings.

1. Interstate Commerce.—The district court found no substantial effect on interstate commerce in this case. We reverse this finding. Undisputed evidence in the record shows that St. Bernard purchased much of its supplies from out-of-state suppliers and from out-of-state manufacturers. The economic damage that St. Bernard alleges obviously affected these transactions, whether directly in terms of St. Bernard's ability to purchase supplies or indirectly in terms of its general economic strength and viability. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (hospital's purchase of substantial percentage of supplies from out-of-state is sufficient to support antitrust juris-

[11] A Rule 41(b) motion also differs from a motion to dismiss for failure to state a claim upon which relief can be granted, Fed.R.Civ. P. 12(b)(6), which requires the judge to grant all favorable inferences to the non-moving party.

[12] The district judge erroneously based his Rule 41(b) findings on the standard of a Rule 50 directed verdict; that is, looking at the evidence and the inferences in the light most favorable to St. Bernard. Our disposition of the case today makes this error harmless, however.

diction).

The Sherman Act's requirement of effect on interstate commerce demands little more than a "not insubstantial" effect on commerce, *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S.Ct. 392, 398, 42 L.Ed.2d 378 (1974), and even an indirect impact by the acts charged upon interstate commerce is not to be tolerated. The commerce requirement of antitrust jurisdiction depends on "the nature of the restraint, and its effect on interstate commerce, and not the amount of the commerce. . . ." *United States v. Central States Theatre Corp.*, 187 F.Supp. 114, 145 (D.Neb.1960). This record establishes that interstate commerce is sufficiently affected to invoke jurisdiction under the antitrust laws. *See also St. Bernard I*, 510 F.2d 1121.

2. Economic Injury.—The district court also supported its decision to dismiss on the basis that antitrust injury was not shown. The court reasoned that the evidence showed that Blue Cross' reimbursements typically would be the same to most hospitals under the most common types of Blue Cross insurance policies. It reasoned that since the vast majority of cases would involve no disparity in payment regardless of the type of relationship between the treating hospital and the Blue Cross organization, St. Bernard could not have suffered antitrust injury.

The district court, however, overlooked the fact that St. Bernard had clearly shown $147,610 in rebates it made to Blue Cross, rebates it would not have had to make if it had been treated on identical terms with the participating hospitals. This figure is undisputed. Regardless of what the "majority" of the Blue Cross reimbursements might

have been to St. Bernard or other hospitals, there is no doubt that St. Bernard was treated differently from the "insider" hospitals, to the amount of $147,610. Since an undisputed quantum of damage was shown, we must reverse the district court's finding that there was no disparate economic impact on St. Bernard.

3. Other Rulings.—The remaining portions of the district court's findings discuss the substance of the antitrust claims. The district court concluded that Blue Cross' reimbursement structure was a prudent, reasonable regulation with a reasonable relationship to prudent business practice. It found no evidence of any sinister or anticompetitive motive to injure St. Bernard. It found there was not a scintilla of evidence that there was any economic coercion. Since these conclusions go to the substantive merit of the antitrust allegations and require a close examination of both the evidence and the district court's interpretation of the facts, we move to a more detailed discussion of St. Bernard's claims for antitrust relief.

C. Price Fixing Claims.

St. Bernard's evidence, presented in one day and contained in one transcript volume, is relatively simple to describe. It shows that the nine participating hospitals controlled the Blue Cross Board of Directors. It shows that Blue Cross did not deal on identical terms with St. Bernard as a contracting hospital compared to the "insider" participating hospitals. Blue Cross also refused to admit St. Bernard to participating hospital status during the years in question.

These facts could add up to a theory that the participating hospitals, through the medium of the Blue Cross

affiliate, combined to inflict financial harm on the other New Orleans hospitals, including St. Bernard. The injury could fall within the part of section 1 of the Sherman Antitrust Act prohibiting combinations in restraint of trade. The plaintiff's precise theory of recovery is neither set forth in the pleadings nor developed at the aborted trial.[13] It could be price fixing, a per se violation of the Sherman Act, price discrimination under the Sherman Act, which is subject to the rule of reason, or other theories of restraint of trade. Also, some claims require a showing of public injury, while others require proof of private harm. The failure of St. Bernard to specify the exact nature of its antitrust theory left it to the court to determine not only whether the evidence was enough to "go the distance," but also to measure off the length of the track.

During oral argument on appeal, St. Bernard suggested that price fixing was involved in this case. It relied heavily on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). The district court in the instant case made its ruling before the *Maricopa* decision was handed down. We examine this recent Supreme Court pronouncement, then, to judge its effect on this appeal.

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[13] We find the pleadings in this case sufficient even though they do not state with particularity the exact proposed theory of relief. Rule 8 of the Federal Rules of Civil Procedure requires only fair notice of the claim. Whether a case is tried to a judge or a jury, federal courts do not insist upon technically precise pleadings. *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 392, 70 S.Ct. 200, 205, 94 L.Ed. 187 (1949). This does not mean that indefinite pleadings are a recommended trial strategy, however. Cases like this one that assert only the barest outline of a claim often will tax the district court and burden the appellate court to "spend a day on the pleadings and the pre-trial order . . . without coming up with any definite idea of how many claims the plaintiff asserts successively or alternatively." *Plastino v. Mills*, 236 F.2d 32, 34 (9th Cir.1956).

The *Maricopa* case examined a county-wide prepaid health plan operated by a foundation that was run by local physicians. The foundation established maximum prices for doctors' services. Nonmember physicians were free to charge their patients any fee, but the foundation would reimburse only up to the maximum on its posted fee schedule. Member physicians agreed to limit their fees to the maximum on the fee schedule. The district court and the Ninth Circuit held that the case fell under the rule of reason rather than per se principles. These courts reasoned that the pro-competitive and pro-consumer benefits of a centralized cost-containment commission overwhelmed any anticompetitive risks inherent in the broad-based agreement on prices. Relying on *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), they ruled that this case fell outside the per se proscriptions of the antitrust laws since the fixing of prices was only at a superficial level and not in the underlying substance. They held that the Maricopa plan was not "price fixing" in the legal sense but merely the fixing of a reasonable price schedule.

The Supreme Court reversed. It acknowledged that the foundation's maximum price schedules could serve to benefit consumers and restrain the escalating cost of physicians' services. It also acknowledged that the foundation might not harbor any anticompetitive intent. However, it still condemned the foundation's practices as illegal per se. The Court's justification was not so much the "competitive abuses or evils which those agreements were designed to eliminate or alleviate," 102 S.Ct. at 2474, *quoting United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S.Ct. 811, 842, 84 L.Ed. 1129 (1940), as much as the interests of "business certainty and litiga-

affiliate, combined to inflict financial harm on the other New Orleans hospitals, including St. Bernard. The injury could fall within the part of section 1 of the Sherman Anti-trust Act prohibiting combinations in restraint of trade. The plaintiff's precise theory of recovery is neither set forth in the pleadings nor developed at the aborted trial.[13] It could be price fixing, a per se violation of the Sherman Act, price discrimination under the Sherman Act, which is subject to the rule of reason, or other theories of restraint of trade. Also, some claims require a showing of public injury, while others require proof of private harm. The failure of St. Bernard to specify the exact nature of its antitrust theory left it to the court to determine not only whether the evidence was enough to "go the distance," but also to measure off the length of the track.

During oral argument on appeal, St. Bernard suggested that price fixing was involved in this case. It relied heavily on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). The district court in the instant case made its ruling before the *Maricopa* decision was handed down. We examine this recent Supreme Court pronouncement, then, to judge its effect on this appeal.

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tion efficiency." 102 S.Ct. at 2473. The Court realized that the match between presumed and actual anticompetitive effects might be imperfect, but that the imprecision did not warrant the rigors of a full scale judicial inquiry into whether the prices set in each particular case were reasonable or not.

The Court acknowledged the possibility that certain price fixing schemes, perhaps even the Maricopa foundation's, could be beneficial rather than harmful to the public. Yet the opinion declares boldly that pro-competitive justifications are no defense to per se price fixing violations. As stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59, 60 S.Ct. 811, 845, 84 L.Ed. 1129 (1940): "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." [14]

The rationale of the majority in *Maricopa* has drawn criticism, both on the Court, 357 U.S. at 457, 102 S.Ct. at 2480 (Powell, J. dissenting), and off. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 S.Ct. Rev. 319; Easterbrook, *Maximum Price Fixing*, 48 U.Chi.L.Rev. 886 (1981). It is clear that the refusal of the Supreme Court to look beyond the surface effect of the pricing arrangements and examine instead the underlying competitive effect prohibits potentially beneficial as well as

[14] The Court did suggest, however, that an additional part of its rationale was the fact that it was the doctors themselves setting doctors' fees. It reserved the question of whether a valid cost-containment price schedule operated by non-physicians would constitute a per se illegal price fixing scheme. 102 S.Ct. at 2477-78.

blatantly monopolistic restraints on pricing. The Supreme Court, though, chose to condemn price controls even when beneficial to consumers in the interest of business certainty and judicial economy.

The case before us is not entirely parallel to the *Maricopa* case. The fee schedules in *Maricopa* were strictly a horizontal restraint, created by the local physicians and applicable only to local physicians on the same tier of the supply chain. Horizontal combinations in restraint of trade are well-established to be illegal per se. *See Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). In today's case, by contrast, St. Bernard charges that Blue Cross, as a customer, combined with the participating hospitals, as suppliers, to prejudice St. Bernard's fiscal interests. The charges do not assume a strictly horizontal restraint, but rather include a vertical link from supplier to customer. These charges are not so clearly per se violations of the antitrust laws. *See id.* at 51-57, 97 S.Ct. at 2558-61.

As a further distinction, this case involves the effort of a private health care payor to fix prices, but only as to others. *Maricopa* involved price fixing within its own board but not as to others. In one sense, then, this case merely presents an individual board's announcement of the terms on which it will deal. Nothing in the antitrust laws prohibits an individual trader, absent an anticompetitive intent, from announcing in advance the terms on which he will deal. *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). The *Colgate* doctrine, however, is inapplicable here. HSA is not a single trader, but instead is an association comprised of nine local hospitals. St. Bernard charges that the maintenance of disparate pricing schedules was not a unilateral

decision on the part of HSA but rather a concerted combination on the part of all nine participating hospitals. A joint effort to fix prices is not protected under the *Colgate* doctrine.

The foundation of doctors in *Maricopa* made no attempt to contain prices to outside, non-member physicians. In today's case, by contrast, HSA has tried to contain prices only as to outsiders and is not limiting reimbursement to its own board members through the cost ceilings. Thus in this sense, this case presents a more egregious scheme of anticompetitive behavior than even *Maricopa*. It imposes burdens on outsiders but not upon the insiders who create the rules.

The *Maricopa* case, due to these dissimilarities, does not control this case. It is possible, even after *Maricopa*, that a pricing schedule could reflect a legal attempt to establish terms of dealing, rather than an illegal price fixing plan. Yet *Maricopa* does, without question, negate the logic employed in the district court here that a price fixing scheme can be legal if its effects further the public interests. Based on the teachings of *Maricopa*, which was decided after the decision of the district court in this case, we find that the hospital has made a prima facie showing of a per se price fixing violation. The case must be remanded to the district court for a full and proper consideration of the per se charges and the damages occasioned thereby.

D. Other Antitrust Claims.

The claims in an antitrust case often may fit within more than one theory of antitrust recovery. St. Bernard's contention on appeal seems to be a per se price fixing violation, as discussed above. Its pleadings, however,

suggest a generalized allegation under section 1 of the Sherman Act.[15] Without the benefit of more detailed pleadings or the transcript of a full trial to guide us,[16] we cannot be sure that price fixing is the sole section 1 theory St. Bernard intends to pursue. We already have found the price fixing theory substantial enough to justify a remand. Nonetheless, we address possible alternative theories of antitrust relief as additional support for our decision to remand. We begin with a discussion of refusals to deal.

The evidence in this case might indicate a refusal to deal, also a violation of Section 1 of the Sherman Act. Blue Cross, in addition to paying non-identical amounts to participating and contracting hospitals, would not admit St. Bernard (and perhaps other hospitals) to participating hospital status. It is clear that Blue Cross was not refusing to deal under any terms with St. Bernard, but it was refusing to deal *on the same terms* as with the nine participating hospitals. A refusal to deal on fair and equal terms can be a prohibited refusal to deal under section 1 of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13, 79 S.Ct. 705, 709-710, 3 L.Ed.2d 741 (1959); *W. W. Montague & Co. v. Lowry*, 193 U.S. 38, 24 S.Ct. 307, 48 L.Ed. 608 (1904).

Whether a refusal to deal is a per se violation of the Sherman Act or subject to the rule of reason is not always

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[15] St. Bernard's final amended pleadings in the district court made a simple, categorical assertion of violations of the Sherman Act and the treble damages provision of the Clayton Act. St. Bernard's counsel conceded on oral argument, however, that this case is being pursued only under section 1 of the Sherman Act, prohibiting combinations in unreasonable restraint of trade. Other provisions of the Sherman Act are no longer in issue. There is, notably, no claim of abuse of monopoly or monopsony power under section 2.

[16] The pleadings, nonetheless, are sufficient. *See* note 13, *supra*.

a simple inquiry. Some cases claim that concerted refusals to deal always fall under the per se category. *E.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., supra.* Other cases, however, clarify the legal analysis and teach that certain factors must be present for a per se analysis to apply. There must be an anticompetitive motive behind the primary purpose of the agreement. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir.1969), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). There must be a commercial purpose to the agreement, rather than, for example, an attempt at industry self-regulation. *United States v. United States Trotting Assn.*, 1960 Trade Cases (CCH) ¶ 69,761 (S.D.Ohio 1960). *See also United States v. Insurance Board of Cleveland*, 144 F.Supp. 684 (N.D.Ohio 1956) (rules of county association of independent insurance agents subject to rule of reason under group boycott charges). The per se category also requires coercive economic pressure. *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra; United States v. New Orleans Insurance Exchange*, 148 F.Supp. 915 (E.D.La.) (J. Skelly Wright, J.), *aff'd*, 355 U.S. 22, 78 S.Ct. 96, 2 L.Ed.2d 66 (1957) (per curiam).

If the requisite factors for a per se refusal to deal violation are not met, the proper course is to examine the conduct under the rule of reason rather than to dismiss the charges completely. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra.* The district court in this case found that many of the factors necessary to support a per se refusal to deal theory were not present. It ruled as part of its Rule 41(b) findings that there was no anticompetitive, sinister motive underlying Blue Cross' behavior. It ruled that the repayment terms furthermore were a reasonable method to protect the public interest and thereby enhance, rather than inhibit, com-

petition.

We have carefully reviewed the evidence in this case and are hard-pressed to define support for the reasons the district court articulated for denying a claim of refusal to deal. The district court found there was no hard evidence of anti-competitive motive. However, the law does not require a "smoking gun" to prove concerted antitrust activity. *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1117 (5th Cir.1979). Dr. Bertucci did testify in a deposition read in open court that he did not feel that St. Bernard competed with the other New Orleans area hospitals. Yet the surrounding circumstances of this testimony suggest that Dr. Bertucci was discussing competition only in the marketing or advertising context, and not with regard to formalized antitrust analysis. The district court concluded that there was competition of a sort among area hospitals. Indeed, any other holding would be illogical.

As to the district court's holding that any refusal to deal equally was reasonable, we notice that the prima facie effects of antitrust behavior have been shown. The only readily-apparent escape would be an affirmative defense that the restrictions were reasonable, or were the least restrictive methods to achieve a legitimate business goal. We cannot make such a finding until the defendant presents its case. Even that evidence, were it to be presented, would of course not counter a per se violation.

We find that the refusal to deal theory also requires remand for a proper disposition. Once again, we offer no opinion on the ultimate merits of the case, as there has not yet been a full trial.[17] We cannot even categorize the

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[17] During the years in question, the nonprofit Blue Cross corporation offered the benefits of membership, *i.e.* participating hospital

nature of St. Bernard's claims as per se violations or rule of reason determinations under section 1 of the Sherman Act. We have, however, examined the evidence presented to the district court and concluded that undisputed credible evidence supports the possibility of a refusal to deal claim under section 1. This fact is an additional underpinning for our decision to remand this case for further proceedings.

Having found sufficient grounds to remand, we do not consider it appropriate to sift through all the facts of this case to uncover every possible theory of recovery under

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status, only to those hospitals that were organized and operated exclusively for the public benefit as nonprofit organizations. St. Bernard was a for-profit, proprietary hospital. It was organized to make a profit for its shareholders rather than to serve the general public welfare.

The theoretical distinction between for-profit and nonprofit hospitals has blurred in recent years, especially since even nonprofit hospitals do not necessarily have an obligation to provide free charitable care. *See* Rev.Rul. 69-545, 1969-2 Cum.Bull. 117 (hospitals may, under some circumstances, qualify for tax exemptions under I.R.C. §§ 170, 501(c)(3) without providing charitable care); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Some commentators have questioned whether any distinction between nonprofit and for-profit hospitals continues to be viable. Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 Harv.L.Rev. 1416 (1980); Note, *Dissolution of Public Charity Corporations: Preventing Improper Dissolution of Assets*, 59 Texas L.Rev. 1429, 1430-32 (1981). In any event, however, valid legal distinctions between the two types of hospitals still exist, and Blue Cross might have had statutory or policy-based justifications during the years in question for its refusal to offer equal, participating hospital status to St. Bernard.

The record also shows that all nine participating hospitals met the accreditation standards of the JCAH during the years in question. This was a condition of participating hospital status. St. Bernard, by contrast, was not JCAH approved. It was, however, properly licensed by the State of Louisiana. Yet the support in the record for valid reasons Blue Cross might have had to discriminate against St. Bernard is not now a concern of this Court. Our role is merely to review whether St. Bernard presented sufficient evidence during the aborted trial to survive a motion for involuntary dismissal.

section 1 of the Sherman Act. We do point out, however, that we do not intend our opinion to foreclose grounds for possible recovery under section 1 that we do not discuss explicitly in this opinion.[18]

Due to the vague nature of the pleadings, we do not know if St. Bernard intends to pursue section 1 theories not covered in today's opinion. We therefore postpone any definitive ruling on whether additional specific theories are supportable in this case, either in law or fact.

Motion to Consolidate

St. Bernard also asks us to review the denial of its motion to consolidate this case with a similar set of actions pending in the same district court. As we mentioned earlier in this opinion, four other Blue Cross contracting hospitals in the New Orleans area have filed charges against HSA, presenting similar antitrust allegations based on the same disparate reimbursement formulas involved in the present proceeding. These four other cases have been consolidated for purposes of discovery and trial. St. Bernard moved repeatedly for consolidation with these other cases, and the other plaintiff hospitals supported the motion. The district court, however, denied this attempt to consolidate the cases.

Consolidating actions in a district court is proper when the cases involve common questions of law and fact, and

[18] The facts might, for example, constitute price discrimination. Price discrimination normally falls under the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a, a statute not discussed in the pleadings. Yet price discrimination might also be evidence of a combination that unreasonably restrains trade in violation of the Sherman Act. *See* Trade Reg.Rptr. (CCH) ¶¶ 3200, 3460 (might constitute Sherman Act violation). *Cf.* L. Sullivan, *Handbook on the Law of Antitrust*, § 220, at 684 (1977) (Robinson-Patman is an analogue to section 2 of the Sherman Act, making no mention of section 1).

the district judge finds that it would avoid unnecessary costs or delay. Fed.R.Civ.P. 42; *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 270-71 (5th Cir.1974), *cert. dism'd*, 423 U.S. 886, 96 S.Ct. 163, 46 L.Ed.2d 118 (1975). Consolidation is improper if it would prejudice the rights of the parties. *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 195-96 (5th Cir.1966), *cert. denied*, 386 U.S. 958, 87 S.Ct. 1027, 18 L.Ed.2d 106 (1967). The district court may order consolidation despite the opposition of the parties. *In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1013 (5th Cir.1977). The fact that a defendant may be involved in one case and not the other is not sufficient to avoid consolidation. *Bottazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49 (5th Cir.1981). The power of the district court to consolidate is purely discretionary. *Chatham Condominium Assns. v. Century Village, Inc.*, 597 F.2d 1002, 1013-14 (5th Cir.1979).

In the case before us, the district judge gave detailed reasons for his denying the motion to consolidate. Some of the reasons given for the ruling are difficult to accept.[19] However, the district judge also ruled that consolidation would be improper because the cases were at different stages of preparedness for trial. At the time of his ruling, the St. Bernard case was ready for trial, while the other cases were still in the discovery stages. The delay to the instant action, which already has languished in the federal court system for over a decade, reasonably could have led to the conclusion that this case should be heard separately

[19] One example is the court's statement that the costs to the parties would increase if consolidation were allowed. The defendant's costs would likely be lower through consolidation, since it would mean defending only one suit rather than two. Regarding burdens to the plaintiffs in the many cases, another reason noted in the district court, we point out that St. Bernard and the plaintiffs in the other cases are all in support of consolidation.

from the consolidated cases. *La Chemise Lacoste v. Alligator Co.*, 60 F.R.D. 164, 176 (D.Del.1973); *Transeastern Shipping Corp. v. India Supply Mission*, 53 F.R.D. 204 (S.D.N.Y.1971). *See also* Moore's Federal Practice ¶ 42.02[3].

We cannot say that the denial of consolidation was an abuse of the district court's broad discretion.

We note, however, that our decision today changes the circumstances that affect the question of consolidation. We are remanding for a new trial on the merits, which might be some months away. The four consolidated cases, meanwhile, have proceeded through discovery and are also just a few months away from trial. Because our decision today alters the circumstances surrounding the motion to consolidate, the district court should reconsider the motion to consolidate and rule on whether the interests of judicial economy and fundamental fairness to the parties support consolidation at this time. The decision lies properly in the sound discretion of the district court and not in the Court of Appeals.

Conclusion

We find that the evidence St. Bernard presented at trial establishes the basis of a claim under section 1 of the Sherman Act, sufficient to support a treble damage claim under the Clayton Act. We therefore reverse the imposition of involuntary dismissal under Fed.R.Civ.P. 41(b) and remand for additional proceedings.[20] We find that the denial of the motion to consolidate this claim with similar cases pending in the same district court was not an abuse of discretion at the time, but remand for reconsideration of the motion in light of the changed circumstances stemming, inter alia, from today's opinion.

REVERSED AND REMANDED.

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[20] Since the plaintiff has already presented a case in chief, there is no need for a totally new trial unless the cases are consolidated. The plaintiff's case will be part of the record on remand, and the plaintiff need not make a new presentation of its case in chief. *United States v. United States Gypsum Co.*, 333 U.S. 364, 402 & n. 20, 68 S.Ct. 525, 545 & n. 20, 92 L.Ed. 746 (1948). The plaintiff, however, is not limited to that evidence already in the record, and may supplement the record with evidence either in chief or in rebuttal. *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336, 1340 & n. 7 (5th Cir.1969).

No. 82-1633

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HOSPITAL BUILDING COMPANY,
Petitioner,
v.

TRUSTEES OF REX HOSPITAL, a Corporation;
JOSEPH BARNES; and RICHARD URQUHART, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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Dated: May 6, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Fourth Circuit properly remanded the case for a new trial so as to accord defendants an opportunity to present evidence showing that their health-care planning activities fell within the "scope and purposes" of then-applicable federal health-care planning legislation and were therefore justified under the rule of *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963), as applied to "the health-care industry" by this Court in *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378, 392-93 n.18 (1981).

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In its Petition, plaintiff, Hospital Building Company ("HBC"), commits numerous factual misstatements as well as entirely omitting many of the relevant facts. In reversing and remanding for a new trial, the Fourth Circuit simply gave defendants the opportunity to introduce evidence showing that their actions were part of local health planning efforts funded and encouraged by the then-applicable federal health-care planning legislation cited by the Fourth Circuit. In so holding, the court below faithfully adhered to *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963), as most recently construed in *National Gerimedical Hospital & Gerontology*

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[1] All parties to this action are listed in the caption. Trustees of Rex Hospital has no affiliates, subsidiaries or parent companies.

Center v. Blue Cross, 452 U.S. 378, 393 n.18 (1981). As the Fourth Circuit held, whether defendants are, in fact, entitled to such an implied immunity necessarily requires a retrial because the trial court denied defendants the opportunity to introduce evidence concerning the nature and extent of their conduct.

This Court should deny plaintiff's Petition for Certiorari on this implied immunity issue not only because the Fourth Circuit correctly applied the legal principles settled in *Silver* and *National Gerimedical*, but also because the Fourth Circuit's implied immunity ruling is an interlocutory holding on a non-dispositive [2] issue concerning conduct occurring in 1969-1971 under federal health-care planning legislation since replaced by the National Health Planning and Resources Development Act of 1974, 88 Stat. 2225 (1974) ("1974 Planning Act"). This ruling simply does not present "special and important reasons" for review required by Rule 17.1 of this Court's Rules. However, if the Court should grant plaintiff's Petition, the Court should also grant review of the additional issues raised by defendants in their Rule 19.5 conditional cross-petition for certiorari. *Trustees of Rex Hospital, et al. v. Hospital Building Company*, Dkt. No. 82-1762 (filed April 28, 1983).

I. THE FACTS

Defendant Rex Hospital is a non-profit North Carolina corporation established in 1840. (D-441.)[3] At the times relevant here, defendant Joseph Barnes was the Chief

[2] The Fourth Circuit also reversed and remanded for a new trial because (1) of erroneous *Noerr-Pennington* jury instructions, and (2) because the jury was erroneously permitted to consider the State Attorney General's Office as a co-conspirator.

[3] As used in this Brief in Opposition, record citations are to particular exhibits, cited by exhibit number (*e.g.*, "D-441"); to transcript pages of the record, cited as "Tr. ——"; and to volume and pages of the Fourth Circuit Joint Appendix, cited as "App. ——."

Executive Officer of Rex Hospital (Tr. 3813), and defendant Richard Urquhart, Jr., was Vice Chairman of the Board of Trustees. (Tr. 2073-74.) The purported "co-conspirators" of defendants include the federally sponsored and funded Health Planning Council of Central North Carolina ("Health Planning Council" or "Council"); Wake Memorial Hospital System, Inc.. ("Wake"), a public hospital owned by Wake County; the Attorney General and Assistant Attorney General of North Carolina; Blue Cross/Blue Shield Association of North Carolina ("Blue Cross"); and the Joint Long-Range Hospital Planning Committee of Wake County ("Planning Committee").

Plaintiff contends that these alleged "co-conspirators" combined with defendants in a *per se* illegal "market allocation scheme," formulated in 1969-1971 through a community-level health planning effort. Thereafter, defendants expressed views to the North Carolina Medical Care Commission in opposition to plaintiff's application for a "certificate of need" to build a new hospital in Raleigh, sought a rehearing when the certificate was initially granted, and appealed an adverse decision to the courts. Plaintiff alleges that all these activities were pursuant to the original health planning effort or "market allocation scheme" and were, therefore, a "sham."

A. The Pre-1974 Health-Care Planning Legislation Cited By The Fourth Circuit

Plaintiff alleges that defendants' health planning activities constitute *per se* illegal violations of the Sherman Act. Plaintiff virtually ignores the comprehensive framework of pre-1974 federal health-care planning legislation, cited by the Fourth Circuit, which funded and encouraged the very planning activities plaintiff would condemn as *per se* illegal. By remanding for a new trial, the Fourth Circuit reconciled this legislation with the antitrust laws by according defendants an opportunity to

show that their activities, in fact, fell within the "scope and purposes" of this legislation.

Congress first became concerned with health-care planning with the enactment of the 1964 Amendments[4] to the Hill-Burton Act, 60 Stat. 1049 (1946). These 1964 Amendments provided funding for "50 percent of the costs of comprehensive regional, metropolitan area, or other local area plans for coordination of existing and planned health and related facilities."[5] Defendants' alleged "co-conspirator," the Health Planning Council, was organized in 1964 pursuant to these 1964 Amendments and received immediate approval from the North Carolina Medical Care Commission ("MCC")[6] in accordance "with the official policy of the [MCC] which supports voluntary areawide planning councils for coordinating planning of health facilities. . . ." (App. IX 3646.)

Two years later Congress enacted the Comprehensive Health Planning and Public Health Services Amendments of 1966, 80 Stat. 1180 (1966), a statute cited and quoted by the Fourth Circuit, to provide federal grants to states which had submitted comprehensive health plans. Such state plans were to

> provide for *encouraging cooperative efforts* among governmental or *nongovernmental* agencies, organizations and groups concerned with health services, facilities, or manpower, and *for cooperative efforts between such agencies, organizations and groups* and

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[4] Hospital and Medical Care Facilities Amendments of 1964, 78 Stat. 447 (1964).

[5] S. Rep. No. 1274, 88th Cong., 2d Sess. 5 (1964).

[6] The MCC was the official state agency charged with administering federal Hill-Burton funds and licensing of hospitals. (App. II 509-10.) See N.C. Gen. Stat. §§ 131-117 *et seq.* (1972), *repealed*, 1973 N.C. Sess. Laws ch. 476, § 152.

> similar agencies, organizations, and groups in the fields of education, welfare, and rehabilitation.[7]

These Amendments were intended "to assist in financing comprehensive health planning that would identify public health needs and establish priorities for health services. . . ."[8] The 1966 Amendments also provided 75-percent federal funding to local health planning councils (such as the "co-conspirator" Health Planning Council) for the purpose of "developing . . . comprehensive regional, metropolitan area, or other local area plans *for coordination of existing and planned health services, including the facilities and persons required for provision of such services. . . .*"[9] Pursuant to this legislation, alleged co-conspirator, Health Planning Council, was designated as the official areawide health planning council for Wake, Durham, Orange, Chatham and Person Counties and received federal funding. (App. II 522-23, 700-01.)

The Fourth Circuit also relied on the 1967 Amendments to the 1966 Act.[10] These Amendments provided that state comprehensive health plans administered by state agencies and applied by local health planning councils, such as the Health Planning Council, must

> provide for assisting *each health care facility* in the State to develop a program for capital expenditures for replacement, modernization . . . which will meet

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[7] Section 314(a)(2)(D) of the Public Health Service Act, as amended, *codified at* 42 U.S.C. § 246(a)(2)(D) (1976) (emphasis supplied).

[8] H. Rep. No. 2271, 89th Cong., 2d Sess. 2 (1966). North Carolina fully participated in the administrative framework created by the 1966 Amendments. (App. V 2055-56.)

[9] Section 314(b)(1)(A) of the Public Health Service Act, as amended, *codified at* 42 U.S.C. § 246(b)(1)(A) (1976) (emphasis supplied).

[10] Partnership for Health Amendments of 1967, 81 Stat. 533 (1967).

> the needs of the State for health care facilities, equipment and services *without duplication and otherwise in the most efficient and economical manner*. . . .[11]

These Amendments were "designed to aid health-care facilities in providing for more orderly planning so as to aid them in *eliminating duplications and overlaps* between the services which they provide and the services provided by other facilities serving the same general area." [12]

The Fourth Circuit also cited 1970 federal legislation through which Congress further strengthened the responsibilities of areawide health planning councils. The 1970 Amendments, 84 Stat. 1297 (1970), to the Heart Disease, Cancer, and Stroke Amendments of 1965, 79 Stat. 926 (1965), for example, conditioned the award of federal funds on a showing that the grant application had been considered by a local planning council so as "to insure greater coordination of health planning and programming efforts at the local level and adherence to community established priorities." [13] Similarly, the Medical Facilities Construction and Modernization Amendments of 1970, 84 Stat. 336 (1970), conditioned federal approval of projects on a showing that a local health planning council had had an opportunity to make recommendations on the project. Such requirement was intended "to further improve the coordination required as a part of comprehensive health planning on the State and community level" and to "encourage the development of a coordinated and interrelated community-level system of health-care facilities, avoiding at the same time duplicatory planning." [14]

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[11] Section 314(a)(2)(I) of the Public Health Service Act, as amended, *codified at* 42 U.S.C. § 246(a)(2)(I) (1976) (emphasis supplied).

[12] S. Rep. No. 724, 90th Cong., 1st Sess. 3 (1967) (emphasis supplied).

[13] H. Rep. No. 1297, 91st Cong., 2d Sess. 7 (1970).

[14] S. Rep. No. 657, 91st Cong., 2d Sess. 13 (1970). *See also* H. Rep. No. 91-262, 91st Cong., 1st Sess. 13 (1969).

B. The Creation Of The Joint Long-Range Hospital Planning Committee of Wake County

The "co-conspirator" Health Planning Council carried out its duties under the foregoing legislation by "promot-[ing] local organized comprehensive health planning" in the region it served. (App. V 2155-56.) The Council intended "through proper planning to maintain or limit the expansion—the rise of costs that was taking place at that time. . . ." (App. V 2161.) The Council therefore "dedicated itself towards orderly planning for the health needs of the citizens of its territoy including Wake County." (App. VIII 3351.)

Pursuant to these objectives (App. V 1976, 1978, 2026-29, 2158-59), and for the purpose of holding "down the cost of medical care in Wake County" (App. V 1978), the Health Planning Council participated in the creation of an alleged "co-conspirator," the Joint Long-Range Hospital Planning Committee of Wake County ("Planning Committee"), which was formed in 1969. The Planning Committee was an *ad hoc* group of 26 members of the public (App. VII 2880-81, 2885-87), of which two *ex officio* non-voting members were from Rex Hospital and two were from Wake Memorial Hospital. (App. V 2002-06.) Plaintiff was also invited to participate (App. V 1950-51, 2012; App. VI 2550-51) but after some initial involvement, plaintiff dropped out because it was "not planning" on expansion. (App. V 1951-52.)

After a series of 36 public meetings, the Planning Committee issued a Report in March 1971 recommending the expansion of Wake Memorial and the construction of a new hospital by Rex Hospital. The Report also contemplated that plaintiff's hospital, Mary Elizabeth Hospital, would expand from 40 to 60 beds. The Report endorsed "comprehensive health planning," recommending that "[t]here should be a continuing planning effort on a county-wide and area-wide basis for hospitals and health care." (App. VII 2883.) Upon issuance of the Report, the

Planning Committee disbanded. (App. II 582; App. V 2023, 2235-37.) It is this Report that plaintiff identifies as constituting the so-called "market allocation" conspiracy.

C. Plaintiff's Application For A Certificate Of Need

On July 21, 1971, the North Carolina legislature enacted a Certificate of Need law ("CON law") which declared as the "public policy of the State" that development of health and medical care facilities "shall be accomplished in a manner which is orderly, timely, economical, and without unnecessary duplication of these facilities." 1971 N.C. Sess. Laws ch. 1164, § 90-289. The CON law required that any proposed medical facility make an application for a certificate of need and that the MCC, as the licensing agency, make "a determination of need" with respect to such new facility. (§ 90-291(a).)

The CON law relied on the planning structure previously created by the foregoing federal health planning legislation. Thus, the CON law required the MCC to forward any application for a certificate of need "to the appropriate approved areawide health planning council for review." (§ 90-291(d).) Section 90-291(c) of the CON law required both the MCC and the areawide health planning council to consider an application for a certificate of need in light of "the number of existing and *planned* facilities" as well as "the availability of facilities or services which may serve as alternatives or substitutes." (Emphasis supplied.) The CON law also prohibited any disposition of an application that was contrary to the recommendations of the areawide planning council "unless such council has been notified by [the MCC] of the reason for its determination and has been granted full opportunity for hearing thereon by the board reviewing such a council's findings." (§ 90-291(c).)

On November 1, 1971 plaintiff filed an application for a certificate of need to replace the existing Mary Eliza-

beth Hospital with a new 140-bed general proprietary hospital in Raleigh. (App. VII 3029-51.) On November 4, 1971, in accordance with the CON law, the MCC forwarded the application to "co-conspirator", Health Planning Council, requesting recommendations. (App. IX 3678.) The MCC also requested the comments of other health providers, including Rex Hospital. (App. VII 2658.) Rex Hospital expressed views before the Council in opposition to the application, contending that the proposal was inconsistent with the recommendations of the Planning Committee for a "planned and orderly" development of facilities in Raleigh. (App. VII 2911.)

After receiving all comments, the Council recommended against the application, stating that the unplanned new Mary Elizabeth would duplicate other medical and surgical facilities (App. II 553-55; App. V 2163-66), and did not satisfy the requirement of Section 90-291(c) that the facility "contribute to the orderly development of adequate and effective health services." (App. V 2168.) The Council accordingly recommended to the MCC that plaintiff's application be denied. (App. VII 2978.)

After a hearing, on May 5, 1972, the MCC granted a certificate of need to plaintiff. (App. VII 2745.) In accordance with Section 90-291(c) of the CON law, the MCC advised the Council that it was entitled to a further hearing on the application. (App. VIII 2745.) Dissatisfied with the result, the Council exercised its rights and requested a hearing. (App. VIII 3335.) Rex Hospital also requested a hearing to present new evidence. On June 30, 1972, after a second hearing, the MCC affirmed its May 5, 1972, decision. (App. VII 2789.)

On July 28, 1972, acting pursuant to Section 90-291(h) of the CON law which permitted appeals to the state courts on "[d]ecisions concerning a certificate of need law," the Council appealed the MCC decision to the Wake County Superior Court. (App. II 824.) This appeal was

taken on the recommendation of its legal counsel. (App. VII 2796-97.) On February 9, 1973, the appeal was voluntarily dismissed as moot after the January 26, 1973, decision of the North Carolina Supreme Court in *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973), which struck down the 1971 North Carolina CON law under the State Constitution.[15] This dismissal marked the cessation of all acts of defendants or the Health Planning Council in opposition to plaintiff's plans to build a new hospital.

D. The Alleged Blue Cross Discriminatory Reimbursement Policy

Plaintiff argues that the alleged conspiracy included, as a so-called "secondary plan," the use of a post-opposition discriminatory Blue Cross reimbursement policy. (Pet. at 8 n.13.) This contention is utter nonsense. The Blue Cross policy (1) was not, in fact, discriminatory; (2) was not adopted pursuant to any conspiracy; and (3) in any event, did not result in any delay to plaintiff.[16] Further, defendants do not contend that this alleged policy of Blue Cross falls within the *Silver* immunity rule.

The undisputed facts of record, ignored by plaintiff, overwhelmingly support these contentions. The Blue Cross reimbursement formula was not "discriminatory"; it was also "applied to non-profit hospitals." (App. IV 1382-83.) Blue Cross applied the same formula to deny approval of rate increases to both "[p]roprietary and non-proprietary" hospitals. (App. IV 1406-07.) Plaintiff's request for Blue Cross rate approval was denied only because its charges were "excessive" (App. IV 1375) and "unreasonable."

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[15] North Carolina reenacted a certificate of need law in 1978. N.C. Gen. Stat. §§ 131-175 *et seq.* (1981).

[16] At the new trial ordered by the Fourth Circuit, plaintiff will be required to prove its case on all three of these issues.

(App. IV 1404.)[17] The reimbursement formula was completely uninfluenced by defendants, or any alleged co-conspirator, and was not adopted pursuant to any "plan" between Blue Cross and defendants. (App. V 1939-41, 2021-22; App. VI 2275.)[18]

Similarly, there is a complete lack of evidence that the Blue Cross policy in any way delayed plaintiff in building its hospital. Plaintiff's own witnesses repeatedly testified that the post-opposition delay was caused by enactment of Section 1122 of the Social Security Amendments of 1972, 86 Stat. 1329 (1972) (App. V 1875), and thereafter, by the sudden rise of interest rates lasting to 1977, which made it difficult for plaintiff to obtain financing. (App. III 959, 985; App. IV 1481-84, 1534.) At trial, plaintiff's theory of the case completely excluded any possibility that the Blue Cross reimbursement policy caused any delay apart from or in addition to the delay allegedly caused by defendants' opposition to plaintiff's application for a certificate of need.[19]

II. THE FOURTH CIRCUIT'S DECISION

The Fourth Circuit reversed and remanded for a new trial on three independent grounds of which plaintiff identifies only one as a reason for granting certiorari. First, the Fourth Circuit held that defendants should be accorded an opportunity, denied to them by the trial court, to answer plaintiff's antitrust claims by showing on remand that their health planning activities, undertaken in 1969-1971, fell within the scope and purposes of then-

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[17] After the January 1977 sale of plaintiff to Hospital Corporation of America, a proprietary hospital chain, Blue Cross promptly approved the next rate request submitted by plaintiff. (App. IV 1409-10.)

[18] *See Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield*, 555 F. Supp. 337 (E.D. Mich. 1983).

[19] *See* note 29 and accompanying text, *infra*.

applicable federal health-care planning legislation. Recognizing that this approach involved an implied immunity, the Fourth Circuit relied on the principles outlined in *Silver v. New York Stock Exchange*, 373 U.S. 340, 360-61 (1963) (a decision not even *cited* by plaintiff in its petition), where this Court held that "particular instances" of otherwise *per se* illegal conduct which "fall within the scope and purposes" of another federal statute "may be regarded as justified in answer to the assertion of an antitrust claim." The Fourth Circuit thereupon analyzed the "scope and purposes" of the pre-1974 health planning legislation, holding that this legislation contemplated planning activities by governmental and non-governmental entities for the purpose of preventing "needless duplication" of health care facilities and services. The court concluded that defendants were entitled to an opportunity to prove, as an affirmative defense, that their conduct was, in fact, merely a good faith attempt to undertake the planning funded and encouraged by Congress in the pre-1974 legislation. (Pet. App. A at 7a-13a.)[20]

The Fourth Circuit also relied on footnote 18 of this Court's opinion in *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378, 393 n.18 (1981), where the Court adopted the *amicus* position of the United States, holding that the reconciliation mandated by *Silver* necessarily meant that some types of conduct falling within the scope and purposes of federal health-care planning legislation are impliedly immune from prosecution under the antitrust laws. The Fourth Circuit simply applied the legal principles settled in *Silver* and affirmed in *National Gerimedical* to conduct taking place under pre-1974 federal health-care planning legislation and gave defendants a chance to introduce evidence under this test. This holding is the only ground upon which plaintiff seeks review.

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[20] Citations to the Fourth Circuit's opinion are to Appendix A attached to plaintiff's Petition for Certiorari.

Second, in a series of rulings from which plaintiff does not seek review, the Fourth Circuit found erroneous several of the trial court's *Noerr-Pennington* [21] jury instructions. For example, at trial and before the Fourth Circuit, plaintiff contended that defendants' opposition to its certificate of need application fell with the sham exception to the *Noerr-Pennington* doctrine because the opposition was pursuant to a "larger scheme," *i.e.*, defendants' health planning activities. The trial court accepted this "larger scheme" sham theory, instructing the jury that "[i]f the courts are used or litigation is filed as part of an overall scheme to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity." (Pet. App. A at 15a.) The Fourth Circuit correctly held that "[t]his charge is erroneous." (*Id.*) [22]

Third, the Fourth Circuit held that the trial court's jury instructions had improperly permitted the jury to find that the North Carolina Assistant Attorney General, Christine Denson, became a co-conspirator by virtue of her assistance to the Health Planning Council during one of the hearings on plaintiff's application. As urged by the State of North Carolina, appearing as *amicus curiae* be-

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[21] *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

[22] Plaintiff does not seek review of the Fourth Circuit's rejection of the "larger scheme" instruction. Plaintiff does attempt to "reserve the right to argue" (Pet. at ii) the merits of the Fourth Circuit's separate refusal to accept the trial court's additional jury instruction that "conduct in abuse of the adjudicatory or judicial process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws." (Pet. App. A at 15a.) Since plaintiff does not seek certiorari on this holding, it may not "reserve" the right to argue its correctness. Rule 21.1(a) of this Court's Rules states "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." The reference to "questions" in Rule 21 necessarily means only those "questions" on which certiorari is sought.

low, the court held that "[w]e do not believe that HBC has offered sufficient evidence that [the Assistant Attorney General] was not merely fulfilling her duties as an assistant attorney general and was instead knowingly contributing to the illegal conspiracy by assisting the Central Planning Council in its attempts to prevail before the MCC." (Pet. App. A at 17a.)[23]

Plaintiff's Petition seeks certiorari only on the implied immunity question. Thus, even if this Court were to grant certiorari and reverse the Fourth Circuit's implied immunity ruling, the Court nonetheless would be compelled to affirm the Fourth Circuit's reversal and remand on the basis of the Fourth Circuit's other rulings. The new trial required by these other rulings[24] only serves to

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[23] While plaintiff does not seek certiorari on this issue, plaintiff attempts to "reserve" the issue, implying that the Fourth Circuit required more than a preponderance of the evidence in order to show membership in the conspiracy. (Pet. at ii.) As with plaintiff's attempt to "reserve" the *Noerr-Pennington* question, plaintiff may not "reserve" the right to argue an issue on which certiorari is not sought. The Fourth Circuit certainly did not require more than a preponderance of the evidence; it merely found that plaintiff had failed to introduce sufficient evidence for the issue to go to the jury under that standard. This Court does not sit to review such factual determinations.

[24] Plaintiff argues that the Fourth Circuit "did not rule that the trial court committed reversible error" on these additional issues. (Pet. at 12 n.17.) This contention is nonsense. It is axiomatic that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919). *See also United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 10, 11 (1970). The trial court's jury instructions were hardly "harmless error." In *Pennington*, for example, this Court held that "larger scheme" instructions were not harmless error because of the "obviously telling nature" of such evidence. (381 U.S. at 670.)

emphasize the interlocutory nature of the Fourth Circuit's implied immunity ruling.[25]

SUMMARY OF ARGUMENT

1. The writ should be denied as premature. The Fourth Circuit remanded this case for new trial on both implied immunity and *Noerr-Pennington* issues. A new trial is also necessitated by the Fourth Circuit's rejection of the co-conspirator status of the North Carolina Attorney General. The Court should adhere to its usual practice of denying interlocutory review so as to permit the development of the full factual record ordered by the Fourth Circuit.

2. In reconciling the antitrust laws with the pre-1974 federal health planning legislation, the Fourth Circuit merely applied *Silver* and *National Gerimedical* to conduct occurring under legislation which has since been replaced by the 1974 Planning Act. The case thus represents the application of well-settled legal principles in a judgment concerning out-of-date federal legislation. Certiorari is inappropriate in such unique circumstances.

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[25] The Fourth Circuit rejected two other grounds for reversal urged by defendants. First, the court affirmed the trial court's refusal to give a separate interrogatory to the jury on the issue of plaintiff's preparedness. Second, the court held that under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), defendants could be found liable for the post-opposition delay caused by the enactment of other federal legislation and the rise in interest rates. These issues are addressed in defendants' conditional cross-petition for certiorari. *Trustees of Rex Hospital, et al. v. Hospital Building Company*, Dkt. No. 82-1762 (filed April 28, 1983).

REASONS FOR DENYING CERTIORARI

I. THE FOURTH CIRCUIT'S DECISION IS AN INTERLOCUTORY JUDGMENT CONCERNING OUT-OF-DATE LEGISLATION ON A NON-DISPOSITIVE ISSUE

A. Certiorari Should Be Denied Because Of The Interlocutory Nature Of The Judgment Below

Throughout its Petition, plaintiff argues as if the Fourth Circuit had actually held that defendants' conduct was immune from the antitrust laws. On the contrary, the Fourth Circuit merely formulated an affirmative defense of limited implied immunity based on *Silver* and *National Gerimedical* and held that "defendants are entitled in further proceedings to have [the affirmative defense] applied *to the extent the evidence on retrial may justify.*" (Pet. App. A at 12a-13a; emphasis supplied.) At this stage of the case, the record simply does not contain sufficient evidence as to whether defendants have met their implied immunity defense. Certiorari should be accordingly denied so as to permit further development of the facts.

Denial of certiorari is plainly indicated by the long-standing principle that this Court "should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Railway*, 148 U.S. 372, 384 (1893). This Court has consistently adhered to this practice in later decisions. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

Denial of plaintiff's Petition will not preclude later review of this case. In *Hamilton-Brown Shoe Co. v. Wolf*

Brothers & Co., 240 U.S. 251 (1916), for example, the Court rejected the argument that denial of certiorari from an interlocutory judgment precluded review of the questions decided by the interlocutory decision when the case was ultimately accepted after a second, final decision. The Court explained that "except in extraordinary cases, the writ is not issued until final decree" and the non-final nature of a decree is "a fact that of itself alone furnished sufficient ground for the denial of the application . . . ." (240 U.S. at 258.)

These principles strongly favor denial of the writ. As plaintiff's counsel, Eugene Gressman, has written, "[t]he Supreme Court will not usually grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court for a new trial. . . ." R. Stern, E. Gressman, *Supreme Court Practice* ¶ 4.19 at 300 (5th ed. 1978). Plaintiff has not presented any compelling or "extraordinary" reason for this Court to deviate from its usual practice of denying interlocutory review. The Court should adhere to *Hamilton-Brown* and refuse to accept review of the interlocutory judgment below.

B. The Fourth Circuit's Implied Immunity Ruling Concerns Conduct Under Federal Legislation Since Replaced By The 1974 Planning Act

As *Hamilton-Brown* explained, an issue must be truly "extraordinary" for the Court to accept interlocutory review. The implied immunity issue decided by the Fourth Circuit is not such an issue because it concerns health planning conduct taking place in 1969-1971 under a federal statutory scheme that was almost entirely replaced by the 1974 Planning Act.[26] Indeed, plaintiff takes the position that the 1974 Planning Act "has no relevance to the merits of this action." (Pet. at 14 n.19.)[27]

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[26] *See* Section 5(c) of the Act, 88 Stat. at 2275 (1974).

[27] Plaintiff speculates that cases involving the 1974 Planning Act "will be considered under the Fourth Circuit's test if that decision

It is well established that certiorari is inappropriate in such circumstances. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), for example, this Court dismissed certiorari as improvidently granted upon discovering that a state statute enacted subsequent to the commencement of the litigation prevented the ultimate question presented in the case from recurring, stating:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. (349 U.S. at 74.)

See also District of Columbia v. Sweeney, 310 U.S. 631 (1940) ("Petition for writ of certiorari . . . denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance").

C. A Retrial In This Case Would Be Necessary Regardless Of The Fourth Circuit's Implied Immunity Ruling

The Fourth Circuit's implied immunity ruling is only one of several grounds necessitating a retrial in this case. Review of the implied immunity decision would not shorten the case or preclude a retrial and is thus not "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction*, 148 U.S. at 384. Indeed, while retrial of this matter will encompass fact issues relevant to the implied immunity question, the case may well ultimately turn on the

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is allowed to stand." (Pet. at 24 n.29.) The short answer to this assertion is that the Court should consider reviewing such a case when and if it arises.

Noerr-Pennington issues or the absence of the Assistant State Attorney General as an alleged co-conspirator. *S* ·, *e.g., Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 10, 11 (1970).

The special interrogatories submitted to the jury made clear that plaintiff's entire theory of liability and damages turned on the legality of defendants' petitioning efforts before the MCC and the Superior Court of Wake County—not on the legality of defendants' planning efforts. Interrogatory 6 asked the jury to determine whether defendants' opposition before the MCC and the appeal by the Health Planning Council to the Superior Court violated the antitrust laws. (App. I 293.) The trial court then instructed:

> If your reply to Question 6 is "No," *do not answer* Question 7. If your reply to Question 6 is "Yes," proceed to answer Question 7. (*Id.*; emphasis supplied.)

Question 7 asked the jury to determine "what amount . . . the business of Hospital Building Company was damaged." (*Id.*)[28] Plainly, plaintiff is not entitled to any relief if defendants' opposition before the MCC and the Superior Court did not violate the antitrust laws under the *Noerr-Pennington* doctrine.[29]

It is undisputed that the *Noerr-Pennington* doctrine immunizes defendants' opposition unless plaintiff can satisfy the "sham exception" to the doctrine. In recognition of

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[28] The Special Verdict form is attached as an appendix to defendants' cross-petition for certiorari. *Trustees of Rex Hospital et al. v. Hospital Building Co.*, Dkt. No. 82-1762 (filed April 28, 1983). Plaintiff stated at trial that it had "[n]o objection" to this Special Verdict form. (Tr. 5254.)

[29] Interrogatory 6 also makes clear that plaintiff's theory of liability and damages completely excluded the alleged post-opposition Blue Cross reimbursement policy, the so-called "secondary plan." In short, plaintiff's "secondary plan" argument is irrelevant under plaintiff's own theory of the case.

this reality, plaintiff tried the case—and the trial court instructed the jury—on the theory that the planning activities of defendants constituted a "larger scheme," the presence of which supposedly converted the opposition into a "sham." It was, however, this "larger scheme" theory which the Fourth Circuit found to be "erroneous." (Pet. App. A. at 15a.) Plaintiff does not seek review of this holding. Certiorari is thus premature because a retrial on the *Noerr-Pennington* issues may be dispositive.

II. THE FOURTH CIRCUIT'S IMPLIED IMMUNITY RULING IS SIMPLY AN APPLICATION OF *SILVER* AND *NATIONAL GERIMEDICAL* TO THE PARTICULAR FACTS OF THIS CASE

A. The Fourth Circuit Properly Applied *Silver* And *National Gerimedical*

The Fourth Circuit's implied immunity analysis is hardly novel as plaintiff contends. Rather, the Fourth Circuit merely applied to the facts of this case the implied immunity principles set forth in *Silver* and expressly applied to "the health-care industry" by a unanimous Court in *National Gerimedical.* This case thus does not present any important or unsettled questions of federal law warranting review by this Court.

In *Silver*, a decision expressly relied on by the Fourth Circuit and yet not even cited by plaintiff in its Petition, the issue presented was whether a group boycott conducted by the New York Stock Exchange under the Securities and Exchange Act was *per se* illegal. The Court agreed that "absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act" (373 U.S. at 348-49), but held that the proper approach was "to *reconcile* pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of *a public policy*

contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications." (373 U.S. at 349; emphasis supplied.) The Court reasoned that such an approach required the use of the "rule of reason," stating that "*under the aegis of the rule of reason*, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." (373 U.S. at 360; emphasis supplied.)

Explaining that this approach did not involve a blanket repeal, the Court in *Silver* focused on the possibility of specific conflicts, reasoning that while "the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . . it is also true that *particular instances* of exchange self-regulation *which fall within the scope and purposes* of the Securities Exchange Act *may be regarded as justified in answer to the assertion of an antitrust claim*." (373 U.S. at 360-61; emphasis supplied.) The Court then reviewed the statute and concluded that the discontinuance of the wire service at issue there was not "so justified" because defendants had denied plaintiffs a hearing on the reasons for the discontinuance. Such a denial, the Court ruled, served no policy "reflected" in the Securities Act. (373 U.S. at 361.)

The analysis of *Silver* was expressly applied to "the health-care industry" in *National Gerimedical.* (452 U.S. at 392.) There, the issue was whether there was a blanket exemption for a Blue Cross policy pursuant to which Blue Cross refused to deal with hospitals unless the hospitals' capital expenditures had undergone planning review by the local Health Systems Agency established under the 1974 Planning Act. The Court held that the Act did not "create a 'pervasive' repeal of the antitrust laws as applied to every action taken in response to the health-care planning process." (452 U.S. at 393.) The Court also held that "there was no specific conflict be-

tween the [1974 Planning] Act and the antitrust laws in this case" (452 U.S. at 393), reasoning that "there is no reason to believe that Congress specifically contemplated" such actions by Blue Cross. (452 U.S. at 391.)[30]

In so holding, however, this Court took pains to "emphasize that our holding does not foreclose future claims of antitrust immunity in other factual contexts." (452 U.S. at 393 n.18.) Adopting the *amicus* position of the United States and relying on *Silver*, the Court observed that an implied antitrust immunity may be appropriate under the 1974 Planning Act in cases of specific conflict, where, for example, a local Health Systems Agency (the successor to Health Planning Councils under the 1974 Act) "has expressly advocated a form of cost-saving cooperation among providers. . . ." (*Id.*)[31] The Blue Cross policy there involved did not pose such a specific conflict, the Court ruled, because "the conduct at issue is not cooperation among providers, but an insurer's refusal to deal with a provider that failed to heed the advice of an HSA." (*Id.*)

In this case, the Fourth Circuit merely reconciled the antitrust laws with the pre-1974 federal health-care planning legislation. As *Silver* and *National Gerimedical* held, " 'the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.' " *National Gerimedical*, 452 U.S. at 392, *quoting Silver*, 373 U.S. at

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[30] The Court also noted that application of the antitrust laws to Blue Cross' conduct would not "frustrate a particular provision" of the 1974 Planning Act. (452 U.S. at 390.)

[31] The Court further quoted the position of the United States which argued that "there are some activities that *must*, by implication, be immune from antitrust attack" (452 U.S. at 393 n.18; emphasis supplied). The Court also quoted from legislative history, noting that the " 'intent of Congress was that HSAs and providers who voluntarily work with them in carrying out the HSA's statutory mandate should not be subject to the antitrust laws.' " (*Id.*)

357. The Fourth Circuit thus reasoned that the necessary first inquiry was into what Congress "contemplated" in enacting the pre-1974 legislation. *Silver*, 373 U.S. at 358; *National Gerimedical*, 452 U.S. at 391.[32] While plaintiff berates the Fourth Circuit for relying on what Congress "envisioned" in enacting this planning legislation (Pet. at 13), there is hardly a difference of legal significance between what Congress "contemplates" and what Congress "envisions." As the Fourth Circuit recognized, in each case the test is whether the challenged conduct falls within the "scope and purposes" of other federal legislation. *Silver*, 373 U.S. at 361. *See also McDonnell v. Michigan Chapter # 10*, 587 F.2d 7, 9 (6th Cir. 1978).

Adopting "a fairly narrow intepretation" of the pre-1974 legislation, the Fourth Circuit found that "the statutory authorization relied upon here . . . runs only to good faith participation in planning activities aimed at avoiding the needless duplication of health care resources in an affected area." (Pet. App. A at 11a.) This construction of the pre-1974 legislation is overwhelmingly supported by the language and legislative history of the statutes cited by the court of appeals below. (Pet. App. A at 10a-11a.)

The Fourth Circuit's reliance on the good faith of defendants is consistent with both *Silver* and *National Gerimedical*. In *Silver*, the Court declined "to pass upon the sufficiency of the reasons which the Exchange later assigned for its action," holding that the Exchange had "plainly exceeded the scope of its authority under the Securities Exchange Act." (373 U.S. at 365.) The Court

[32] In *Silver*, the Court stated that "[t]he issue is only that of the extent to which the character and objectives of the duty of exchange self-regulation *contemplated* by the Securities and Exchange Act are incompatible with the maintenance of an antitrust action." (373 U.S. at 358; emphasis supplied.) Similarly, in *National Gerimedical*, there was no conflict because Congress had not "contemplated" conduct such as that engaged in by Blue Cross. (452 U.S. at 391.)

concluded, therefore, that there was no need to decide whether the justification was "to be governed by a standard of arbitrariness, *good faith*, reasonableness, or some other measure." (373 U.S. at 366; emphasis supplied.)

In this case, the Fourth Circuit merely held that good faith was the appropriate standard under the pre-1974 health planning legislation. The court took pains to note that this standard was to be applied by reference "to the health care needs of the consumer public in the market area at the time in question, objectively assessed, and not in relation to the economic or other needs of the 'planners,' either objectively or subjectively assessed." (Pet. App. A at 12a.) This standard is the bare minimum necessary. Unless providers are assured that good faith participation in planning is protected, they will not become involved in health planning and the purposes of federal planning legislation will be thwarted. As the Fourth Circuit found, such "participation by private health care providers is clearly anticipated and we think desirable." (Pet. App A at 9a-10a.) Such participation is identical in principle to the good faith "cost-saving cooperation among providers" which this Court suggested would be immune in footnote 18 of *National Gerimedical*.[33]

Plaintiff, acknowledging as it must that *National Gerimedical* supports an implied immunity, argues that "[n]one of the 'planning' activities of respondents were organized under or conducted pursuant to any of the statutes cited by the Fourth Circuit." (Pet. at 15.) This *ipse dixit* is simply wrong on the facts. More importantly, as the Fourth Circuit recognized, defendants were precluded from introducing evidence under this test by the trial court's *per se* ruling. The remand ordered by the

[33] Such participation in local health planning was of the type "contemplated" (452 U.S. at 391) by Congress in the pre-1974 legislation such that application of the antitrust laws to this conduct would "frustrate" (452 U.S. at 390) the provisions of the pre-1974 legislation cited by the court below.

Fourth Circuit simply gives defendants a chance to demonstrate that their planning activities were pursuant to the pre-1974 planning legislation. Essentially, plaintiff would have this Court deny defendants an opportunity to make a record on grounds that the present record is deficient. This "bootstrapping" only serves to highlight the need for the remand ordered by the court below.

B. The Fourth Circuit's Implied Immunity Ruling Is Consistent With The Other Rulings Of This Court

Focusing solely on the Fourth Circuit's use of the term "rule of reason," plaintiff argues that the court created a "hybrid" test never previously sanctioned by this Court. (Pet. at 17.) This disingenious argument elevates form over substance. In using the term "rule of reason," the Fourth Circuit merely adopted the usage of the term in *Silver*, where this Court stated that "under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." (373 U.S. at 360.) The Fourth Circuit expressly recognized, as did this Court in *National Gerimedical*, that this "rule of reason" is simply an implied immunity applicable in "particular instances" of direct conflict between the antitrust laws and other federal statutes. (Pet. App. A at 9a.) There is nothing unique or "hybrid" about this implied immunity; it is a correct application of the legal principles established in *Silver* and *National Gerimedical.*

Plaintiff also argues that the implied immunity test is in conflict with *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). This contention is plainly fallacious. In *Professional Engineers* and *Maricopa*, there was no need to reconcile federal statutory schemes because in neither case was it contended that the challenged conduct was "contemplated" by other federal legislation. The implied

immunity test adopted by the Fourth Circuit is apposite only in instances of a specific conflict between the antitrust laws and another federal statute. This is precisely the teaching of *Silver* and *National Gerimedical.* The Fourth Circuit hardly violated the "separation of powers doctrine," as argued by plaintiff (Pet. at 20-21), in applying *Silver* and *National Gerimedical.*

Finally, the Fourth Circuit's application of the implied immunity test to plaintiff's Section 2 claims was completely proper. Plainly, an implied immunity arising from a need to reconcile federal legislation cannot be limited to claims arising only under Section 1 of the Sherman Act. Indeed, in *National Gerimedical,* the complaint alleged violations of both Section 1 and Section 2 of the Sherman Act. (452 U.S. at 382.)

CONCLUSION

For all the foregoing reasons, plaintiff's Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: May 6, 1983

Nos. 82-1633 and 82-1762

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HOSPITAL BUILDING COMPANY,
Petitioner
v.
TRUSTEES OF THE REX HOSPITAL, *et al.*

TRUSTEES OF THE REX HOSPITAL, *et al.*,
Petitioners
v.
HOSPITAL BUILDING COMPANY

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS/CROSS-PETITIONERS IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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Petitioner

v.

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SUPPLEMENTAL BRIEF OF RESPONDENTS/CROSS-PETITIONERS IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

This supplemental brief is filed in response to the amicus brief of the United States which takes a position opposed to that of the Trustees of Rex Hospital as respondents in No. 82-1633 and as cross-petitioners in No. 82-1762.

I. THE GOVERNMENT'S ARGUMENTS IN SUPPORT OF CERTIORARI IN NO. 82-1633 MISAPPREHEND THE FACTUAL AND LEGAL ISSUES IN THE CASE

A. The Government's Concerns With Respect to the Implied Immunity Test Adopted by the Fourth Circuit Are Misplaced

In support of certiorari, the Government addresses an issue that is not before the Court because it was not decided by and, on the facts of the case, could not have been decided by, the Court of Appeals. The basic holding of the Court of Appeals was that voluntary health care planning activity enjoys a limited antitrust immunity if it is within the scope of conduct specifically contemplated by federal statutes which authorize and encourage such activity. (Pet. App. A at 9a-10a.) This is a straightforward application of the Supreme Court's opinions in *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981), and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1964), as well as the Government's own *amicus* position in *Gerimedical.*

The Government's concern that the Court of Appeals improperly applied the standard set forth in *Gerimedical* and *Silver* is apparently based on a misapprehension of the facts before the Court of Appeals. The Government characterizes the "anticompetitive conduct at issue here" as "an effort to exclude a competitor by [1] an abuse of the North Carolina administrative and judicial process and [2] a boycott with Blue Cross-Blue Shield . . . ." (Gov't Br. at 11-12.) Contrary to the Government's brief, the jury did not award damages for a "group boycott" or "refusal to deal" involving Blue Cross and its findings relevant to any alleged "abuse of process" were vacated on independent grounds for a new determination on remand.

1. Plaintiff did not ask the jury to award damages for any exclusionary conduct involving Blue Cross. The spe-

cial interrogatories presented to the jury allowed it to find damages if, and only if, the jury first found that the defendant hospital , *not* Blue Cross, had engaged in a sham opposition to plaintiff's Certificate of Need Application as part of a "larger plan" to violate the antitrust laws.[1] Interrogatory No. 6 reflected plaintiff's theory that its damages were caused only by the actions of the defendant hospital (not Blue Cross) in opposing plaintiff's application for a Certificate of Need before the relevant regulatory agency, the North Carolina Medical Care Commission ("MCC"), and the ensuing court appeal.[2]

2. Plaintiff's theory of *per se* liability at trial actually resolved around defendants' participation in health care planning activities in 1969-1972 and the effect of those activities on plaintiff's efforts to obtain approval for a

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[1] Interrogatory No. 7 allowed the jury to award damages only if it answered "yes" to Interrogatory No. 6. Interrogatory No. 6 asked:

> Did the Acts committed by the defendants in connection with the Medical Care Commission's consideration of plaintiff's Certificate of Need application and/or in connection with the appeal to the Superior Court of Wake County constitute an abuse of the adjudicatory or judicial process which was part of a larger plan to violate the antitrust laws?

(Cross-Petition App. at 2a; Int. No. 6.)

[2] It is undisputed that Blue Cross was not involved in the opposition. The Government only states that subsequent to the opposition, Blue Cross reimbursed plaintiff at a "lower rate" and "refused to recognize certain HBC rate increases" (Gov't Br. at 3) and that "after HBC obtained authorization to expand, Rex sought to impede construction by conspiring with Blue Cross-Blue Shield to have that insurer demand different and more onerous terms from HBC than from Rex and Wake." (Gov't Br. at 5.) Those contentions are irrelevant because they were never decided by the jury. (*See* Interrogatory No. 6.) They were also refuted at trial by overwhelming and undisputed evidence that Blue Cross had in fact acted unilaterally and had used the same formula for reimbursing plaintiff that it had applied to non-profit hospitals. (*See* Respondent's Br. at 10-11; App. IV 1375; 1404-07; App. V 1939-41; 2021-22; App. VI 2275.)

hospital. As detailed in Respondents' Brief in Opposition, at 7-8, the defendants, as members of a planning committee formed under the auspices of the federally sponsored and funded Health Planning Council, developed a Joint Long Range Plan in 1971 intended to prevent the needless duplication of health care facilities. Plaintiff contended that this 1971 Report constituted the "game plan" of the conspiracy and told the jury that the Report "ultimately became the plan for hospital development in Raleigh, or to put it another way, the plan of the conspirators." (Tr. at 17-18.)

At that time, however, applicable federal statutes authorized and encouraged such voluntary planning activity. For example, the 1966 Amendments to the Health Planning Act provided funding for "developing . . . comprehensive . . . local area plans for coordination of existing and planned health . . . facilities" and encouraged "cooperative efforts among governmental or nongovernmental . . . groups" in such planning efforts.[3] Similarly, as the Fourth Circuit recognized, the 1964 Amendments to the Hill-Burton Act were "intended to prevent construction of facilities which are not needed or are poorly located" and to avoid "the unnecessary duplication of services and facilities" *quoting* S. Rept. No. 1274, 88th Cong. 2d Sess. 3 (1964) (Pet. App. A at 7a-8a).

3. On appeal, all that the Fourth Circuit decided was that defendant was entitled to show the "reasonableness of challenged planning activities" in light of this overall statutory scheme.[4] (Pet. App. A at 12a.) The Fourth Cir-

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[3] Comprehensive Health Planning and Public Health Services Amendments of 1966, §§ 314(a)(2)(D) & (b), Pub. L. No. 89-749; 80 Stat. 1180 (1966) (*codified in* 42 U.S.C. §§ 246(a)(2)(b) & (b) (1976)). (*See generally*, Resp. Br. in Opp. at 5-6 & Pet. App. A at 7a-11a.)

[4] The Government admits that voluntary planning conduct was contemplated by then-existing health care planning legislation. (Gov't Br. at 12 n.15.) The Government also does not contradict the Fourth Circuit's interpretation of the then existing statutory

cuit did not, as the Government suggests, pass upon whether the alleged exclusionary conduct before the MCC came within its test if that conduct abused the "North Carolina administrative and judicial processes." (*See* Gov't Br. at 8 & 12; Pet. App. A at 10a-11a.)

The Fourth Circuit found that in light of federal health care legislation, voluntary participation in "planning activities" intended to avoid "needless duplication in health care resources" would not violate the antitrust laws. (Pet. App. A at 11a.) In reconciling the statutory scheme with the antitrust laws as required by *National Gerimedical* and *Silver*, the Fourth Circuit "specifically" held that " 'planning' under this special rule of reason is not 'reasonable' if its purpose or effect is only to protect existing health care providers from the competitive threat of potential entrants. . ." (Pet. App. A at 11a.) Such a result is consistent with the test enunciated by the Court in *National Gerimedical* and consistent with the position taken by the Government in that case.

The Court in *Gerimedical* recognized that immunity would be appropriate in some cases such as where "Congress specifically contemplated" the action. (452 U.S. at 391 & n.18.) (*See* Resp. Br. in Opp. at 21-23.) In the health care field where Congress has legislated widely, the "proper approach" in reconciling the "statutory scheme" of these laws and the antitrust laws, is an "analysis which reconciles the operation of both. . . ." (*Gerimedical*, 452 U.S. at 392, *quoting Silver*, 373 U.S. at 357.) In its Brief as Amicus Curiae in *Gerimedical*, the United States also recognized that "there may be occasions in implementing health systems plans when an implied exemption might be necessary in order to effectuate the statutory

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scheme. (*Compare* Gov't Br. at 3 n.4 *with* Pet. App. A at 7a-11a.) That entire statutory scheme has since been superseded by subsequent legislation and is not likely to be subject to interpretation in any other case in an antitrust context due to the operation of the statute of limitations.

scheme as required by Congress . . . ." (Amicus Br. at 16 n.11.)[5]

Here, the Fourth Circuit found a statutory purpose to encourage private participation in local planning in an effort to avoid "needless duplication," and found that planning undertaken to that end was "envisioned," i.e. contemplated, by Congress. (Pet. App. A at 10a; *see* Resp. Br. in Opp. at 22-23.) The Fourth Circuit test provides a workable means of applying *Gerimedical* and *Silver* to determine whether the planning conduct, as distinct from a sham opposition before the MCC, constituted a *per se* violation of the antitrust laws.[6] Thus, on remand, defendants will finally be given an opportunity to develop the record as to the true nature of their planning conduct by informing the jury of the wording of existing federal legislation which contemplated and encouraged their planning efforts. This opportunity was denied to them by the district court because of its *per se* approach to the case.

B. In Any Event, Certiorari Is Interlocutory Because a New Trial Is Necessary on *Noerr-Pennington* Issues that Are Not Before this Court

The Fourth Circuit also ruled that the trial court committed error on two additional grounds under the *Noerr-Pennington* doctrine. Although either of these grounds may be dispositive of the case on remand, neither

[5] The Justice Department is also seeking legislation that will reduce antitrust enforcement in other areas where cooperation may be preferable to competition, such as joint research ventures.

[6] Far from creating a "novel" rule of reason inquiry as the Government asserts at page 9, the Fourth Circuit relied upon the language of *Silver* to craft its "good faith" inquiry into the existence of an implied antitrust immunity under the "aegis of the rule of reason." (373 U.S. at 360, 366.) The Court in *Silver* specifically held that "the interposing of a substantive justification in an antitrust suit" could be "governed by a standard of arbitrariness, *good faith*, reasonableness or some other measure." (373 U.S. at 366; emphasis supplied.)

of them is before the Court on the present petition for certiorari. The Government tries to avoid the obvious interlocutory nature of this appeal by suggesting that, if the Supreme Court reverses on the implied immunity issue, the Fourth Circuit might find that these other errors were harmless. (Gov't Br. at 14-15 n.18.) Such wishful thinking ignores the fundamental nature of the errors committed by the lower court.

1. The district court repeatedly instructed the jury that conduct which was "part of an overall scheme" was unprotected by *Noerr-Pennington*, not only in the context of conduct in abuse of the adjudicatory process but also standing alone. (Gov't App. at 1a-4a.) The Fourth Circuit properly recognized the plain error in these instructions because a "larger scheme" without any instance of abuse is not enough to deprive defendants of their First Amendment immunity. (Pet. App. A at 15a.) As this Court held in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), such "larger scheme" instructions are not harmless error because of the "obviously telling nature" of such evidence.[7] (381 U.S. at 670.)

2. The Fourth Circuit also held that, on retrial, the jury could not consider the acts of the Assistant Attorney General as constituting conduct in furtherance of an antitrust conspiracy. (Pet. App. A at 17a.) Such evidence was presented to the jury to prove that defendants had

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[7] The trial court charged the jury that:

> If the courts are used or litigation is filed *as part of an overall scheme* to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity.

(Gov't App. at 4a; emphasis supplied.)

In *Pennington*, this Court held:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone *or as a part of a broader scheme* itself violative of the Sherman Act.

(381 U.S. at 670; emphasis supplied.)

abused the administrative process established to license plaintiff's hospital.[8] It is inconceivable that the Fourth Circuit on remand would not mandate a new trial on this ground alone, given the uniquely prejudicial nature of this evidence.

Accordingly, this Court should deny the writ due to the interlocutory nature of the record. *See, e.g.*, R. Stern, E. Gressman, *Supreme Court Practice* ¶ 4.19 at 300 (5th ed. 1978).

II. THE CROSS-PETITION IN NO. 82-1762 SHOULD BE GRANTED IF CERTIORARI IS GRANTED IN NO. 82-1633

Although it strains to find reasons why this Court should grant certiorari in No. 82-1633, the Government completely ignores the conflicts between the circuits which justify review of both of the issues raised in the Cross-Petition.

1. As Cross-Petitioners demonstrated, the trial court erred in failing to submit a special interrogatory on the critical issue of plaintiff's standing. In opposition, the Government argues that this issue was presented to the jury through Interrogatory No. 4, which dealt with the issue of proximate causation. (Gov't Br. at 17.) In fact, however, the issue of *standing* raised by the question of plaintiff's lack of preparedness to construct a new hospital presents an issue of fact separate and distinct from the issue of *proximate causation*. The jury could have found separately for defendant on this issue if the spe-

[8] As described by the Government, the anticompetitive conduct at issue here was an attempt to exclude plaintiff from the market through an "abuse of the North Carolina administrative and judicial processes. . . ." (Gov't Br. at 12.) In its instructions the trial judge cited to "conspiracy with representatives of an adjudicatory agency" as a specific instance of abuse. (Gov't App. at 3a.) The Fourth Circuit ruled that the evidence of participation in such a conspiracy was insufficient as a matter of law. (Pet. App. A at 17a). This error alone invalidates the Government's assumption that defendants' conduct necessarily involved some sort of "abuse."

cial interrogatories had been properly presented. (*See* Reply of Cross-Petitioners at 2.) The Government fails to address this crucial distinction, which puts the conflict between the circuits squarely before this Court for decision. (Cross-Petition at 10-11.)

2. As to the *Brunswick* issue raised by Cross-Petitioners, the Government fails to address the conflict between the decision of the Fourth Circuit here and those of the Second Circuit in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), and the Sixth Circuit in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1980). (*See* Cross-Petition at 13-14; Reply of Cross-Petitioners at 3-4.) Indeed, the Government does not even cite those decisions. (*See* Gov't Br. at 18-20.)

CONCLUSION

For the reasons stated above and in the earlier briefs of Respondents Cross-Petitioners, the petition in No. 82-1633 should be denied but, if it is granted, the Court should also grant the petition No. 82-1762.

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Dated: September 16, 1983

NO. 82-1633

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OCTOBER TERM, 1982

HOSPITAL BUILDING COMPANY,
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a Corporation; JOSEPH BARNES;
and RICHARD URQUHART, JR.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF FOR PETITIONER

Respondents have endeavored to shield this case from timely review by the Court through attempts to characterize the petition for certiorari as procedurally premature and the Fourth Circuit's decision as substantively trivial. Respondents thereby misconceive two basic certiorari considerations: (i) it is entirely appropriate for the Court to grant certiorari to review the Fourth Circuit's expanded concept of "implied immunity" from the antitrust laws where that concept will, if not overturned, govern the re-trial of this case and (ii) the Fourth Circuit's unprecedented and confusing "special rule of reason"

affirmative defense to *per se* violations is a defense that is destined, if not overturned, for use not only if this case is retried but also in countless future actions that involve *per se* violations of the antitrust laws.

I. THE FOURTH CIRCUIT'S DECISION IS APPROPRIATE FOR REVIEW BY THE COURT AT THIS TIME.

It is abundantly clear that the dispositive issue in this case is whether, the matter having already been tried to a jury under the *per se* doctrine, it is necessary to re-try the case to permit respondents to assert the Fourth Circuit's "good faith" rule of reason affirmative defense. It is equally clear that the re-trial ordered by the Fourth Circuit for the purposes of permitting such a defense creates a precedent for all future antitrust cases involving "planning" activities of any type. The Fourth Circuit's decision thus presents an "important" and "clear-cut" issue of law. Under these circumstances, it is appropriate for the Court to hear this case at this juncture. *See* R. Stern & E. Gressman, *Supreme Court Practice*, §4.19 at 301 (5th ed. 1978).

Respondents assert, however, that the "long-standing principle that the Court 'should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order,' " mitigates against review by the Court. Opp. Brief at 16. That principle has absolutely no bearing on the Court's decision to grant certiorari in this case. Unlike the cases cited by respondents,[1] there has already been a trial on the merits here.

[1] *See American Construction Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916).

Reversal of the Fourth Circuit's decision would terminate this dispute because the jury's verdict would be reinstated. The introduction of evidence with respect to respondents' good faith in order to "complete" the record, will not provide additional guidance in deciding which rule of law should govern this case.

Contrary to respondents' assertion (Opp. Brief at 17), the Court does review the type of federal court judgment involved here where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stern & Gressman, *supra,* at 301. Respondents therefore miscite Eugene Gressman, counsel for petitioner, for the proposition that the "Supreme Court will not usually grant certiorari to review a non-final judgment, such as one remanding the case to the district court for a new trial. . . ." Opp. Brief at 17 quoting Stern & Gressman, *supra,* at 300. Had respondents consulted the next page of Stern & Gressman, they would have learned that the Court does grant certiorari to review "important and clear-cut" issues of law.[2] Certainly the Fourth Circuit's promulgation of an unprecedented standard for assessing the legality of anti-competitive conduct under the antitrust laws represents such an issue.[3]

[2] Had respondents consulted page 53 of Mr. Gressman's text, they would also have learned that "[a]s long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the Supreme Court has jurisdiction to take the case *whatever* its status in the lower courts." (Emphasis supplied.)

[3] Respondents also pretend that "the Fourth Circuit reversed and remanded for a new trial on three independent grounds of which Plaintiff identifies only one as a reason for granting certiorari." Opp. Brief at 11. The Fourth Circuit did *not,* however, find reversible error with regard to either the *Noerr-Pennington* issue or the issue

II. THE FOURTH CIRCUIT'S DECISION, BY CREATING A NEW SPECIAL RULE OF REASON AFFIRMATIVE DEFENSE, RAISES ISSUES OF NATIONAL IMPORTANCE UNDER THE SHERMAN ACT.

Respondents' assertion that this case "represents the application of well-settled legal principles in a judgment concerning out-of-date federal legislation" (Opp. Brief at 15) is a classic misstatement. The "special rule of reason" defense created by the Fourth Circuit in no way reflects "well-settled legal principles" of antitrust law. Further, the so-called "out-of-date" federal health care legislation, which the Fourth Circuit could not find clearly repugnant to the Sherman Act, has not been replaced by legislation that creates such a repugnancy. The critical fact remains that no federal health care planning legislation, past or present, mandates conduct that would otherwise violate the Sherman Act.

Respondents' participation in planning for the needed health care facilities in the Raleigh market is not the subject of this lawsuit. Rather, respondents were found liable by the jury for preventing petitioner's entry into the Raleigh market, *i.e.*, horizontal market allocation, and for their conspiracy with Blue Cross to refuse to deal with petitioner.[4]

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involving the co-conspirator status of Assistant Attorney General Denson. That court's observations on these issues were simply in the context of "additional issues . . . relevant to a new trial" and were addressed only because the court had already—erroneously—ordered "the matter [to] be retried" in light of the special rule of reason which the court had formulated. 691 F.2d at 686-7; Pet. at 13a. In any event, petitioner properly preserved those issues for the Court's consideration. *See* Pet. at ii and Stern & Gressman, *supra*, at §6.27 at 462-3.

[4] Petitioner proved at trial that respondents' conspiracy included the scheme under which respondents conspired with Blue Cross in

It is beyond question that there was a need for additional hospital beds in Raleigh,[5] approximately 100 of which could—and would—have been quickly provided by petitioner had it not been for respondents' conspiracy. Thus, the reason that respondents objected to the expansion of petitioner's Mary Elizabeth Hospital was not that the additional beds planned by Mary Elizabeth were unnecessary or "duplicative" but that respondents had not allocated, in their conspiracy, any of the needed beds to petitioner and that Mary Elizabeth's proposed expansion would operate to the competitive detriment of Rex and Wake Memorial. George Stockbridge, director of the Health Planning Council, conceded as much at trial. (V 2164-5). *See* Appendix A hereto which consists of pertinent excerpts from Mr. Stockbridge's trial testimony.

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order to make it unprofitable for petitioner to expand Mary Elizabeth. (VII 2617, 2635, 2648, 2653, 2855). Respondents' assertion to the contrary (Opp. Brief at 10-11) is based on incredible misreadings and miscitations to the record. For example, respondents erroneously contend (Opp. Brief at 10) that Mr. John W. Moffitt, the director and vice president of provider relations for Blue Cross, testified at IV 1382-83 that Blue Cross's reimbursement policies with respect to for-profit and not-for-profit hospitals were the same. In fact, Mr. Moffitt's testimony referred to only one aspect of Blue Cross's reimbursement policy for *proprietary* hospitals (*see* IV 1380-1382) and in no way referred to Blue Cross's reimbursement policy to not-for-profit hospitals. Further, respondents' own record citations demonstrate that Blue Cross's discrimination against petitioner was the product of a conspiracy among Blue Cross and the respondents that was effectuated, among other ways, through a system of interlocking directorates. *See* V 1941. Respondents' other misrepresentations with respect to their conspiracy with Blue Cross will be dealt with more fully in petitioner's brief in opposition to respondents' cross-petition for certiorari.

[5] The only "plan" which was contemplated by federal health care legislation—North Carolina's "state plan"—found that there was a need for at least 409 additional hospital beds in the Raleigh area. (VII 2830).

As the brief in opposition inadvertently demonstrates, there were no statutes then in effect which authorized respondents' market allocation or refusal to deal conspiracies. *No* statute cited by respondents authorized or required them to combine, under the auspices of any organization, to allocate the additional medical-surgical beds which were necessary for an expanding market. *No* statute cited by respondents authorized or required them to "enforce" this allocation by conspiring to (i) oppose petitioner's attempts to obtain the requisite state approval of its proposed expansion by abusing the procedures for obtaining a certificate of need or (ii) discriminate in insurer reimbursement against petitioner and other proprietary hospitals. *No* statute cited by respondents subjected their conduct to scrutiny for anticompetitive consequences.[6] *See National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 390 (1981).

None of the health care statutes in place at the time of respondents' conspiracy, *or in place at the present time,*

[6] The most that respondents demonstrate is that certain federal statutes that provided for some federal funding contemplated creation of health planning organizations such as the Health Planning Council. Opp. Brief at 2-3. There is nothing in the record, however, to support the contention that the Health Planning Council was organized or funded pursuant to that legislation. Rather, the Health Planning Council was organized on the initiative of local citizens and local governments and funded primarily by them. (II 430-31, 508-09). Moreover, the health planning councils were not created as vehicles for industry self-regulation or to allocate needed health care facilities. Respondents compound their miscitation of federal health care statutes by severely mischaracterizing the scope and purpose of "the 1967 Amendments to the 1966 Act." Opp. Brief at 5-6 quoting 42 U.S.C. §246(a)(2)(I) (1976). The 1967 amendments, which were nowhere "relied on" by the Fourth Circuit, provide only that local health planning agencies, such as the Health Planning Council, might *advise* state health planning agencies. *See* 42 U.S.C. §246(a)(2)(B) (1976). Those amendments do *not*, in contrast to respondents' erroneous contentions, mandate any affirmative conduct by local health planning agencies.

envisioned—let alone authorized—respondents' perversion of the planning process into a horizontal market allocation scheme or a refusal to deal. Only if health care statutes, past or present, authorized private persons to agree on the allocation of health care activities could there be a "clear repugnancy" between the health care regulatory system and the antitrust laws. Because even the current health care statutes create no such repugnancy, the special rule of reason affirmative defense created by the Fourth Circuit can as easily be applied under the current statutes as under the statutes in place when respondents' conspiracy occurred.

Silver v. New York Stock Exchange, 373 U.S. 341 (1963), much relied upon by respondents, dealt with an underlying statutory scheme that gave full power of self-regulation, with all that implies, to private securities exchanges. In *Silver*, this Court held that conduct which was mandated by a self-regulatory scheme imposed by other federal legislation and which would otherwise be a *per se* violation of the Sherman Act, should be analyzed under the rule of reason. 373 U.S. at 360. However, only a "convincing showing of *clear repugnancy* between the antitrust laws and the regulatory system" justifies such implied antitrust immunity. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975) (emphasis supplied).[7] In contrast the only activity "envisioned," contemplated or authorized by the statutes involved in this litigation was funding for planning councils to assess local health care needs. Those statutes did

[7] "Repeal is to be regarded as implied only if *necessary to make the* [*other federal law*] *work*, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver*, 373 U.S. at 357 (emphasis supplied).

not require anyone to engage in health care planning and certainly did not mandate implementation of any plan to allocate needed health care facilities in a given market, particularly to the exclusion of a competitor that was immediately able to help meet local health care needs.

The Fourth Circuit's decision did call upon *Silver* for indirect support for its departure from the *per se* standard, 691 F.2d at 685, Pet. at 10a, but that court failed to employ the implied repeal analysis required by *Silver*. Instead, the Fourth Circuit devised a new analytical framework based upon what it thought Congress might have intended. Respondents' contention that the Fourth Circuit "faithfully adhered" to *Silver* is thus in error. Opp. Brief at 1.

In lieu of the "clear repugnancy" test set forth in *Silver* and consistently adhered to in other cases, the Fourth Circuit substituted a much less exacting standard. It provided for an implied immunity from the antitrust laws because it believed that Congress had "envisioned" participation by hospitals and administrators in the planning of health care facilities. But nowhere in its opinion did the Fourth Circuit find that an implied repeal was necessary to make any of the referenced federal health care legislation work, and clearly it is not. *National Gerimedical* reiterated, but did not alter, the implied repeal analysis in *Silver*. *See* 452 U.S. at 388-93. Accordingly, footnote 18 of *National Gerimedical* does not provide precedent for the Fourth Circuit's implied immunity analysis.[8] *See* Pet. at 15.

[8] Because the Fourth Circuit did not adhere to the *Silver* analysis reiterated in *National Gerimedical*, the "participation by private health care providers" which it endorsed could not be "identical in principle" (Opp. Brief at 24) to the "cost-saving" cooperation among providers which the Court suggested, in footnote 18 of *National Gerimedical*, might be immune from normal application of the antitrust laws.

Respondents' attempts to maintain that the courts should ask if they were acting in "good faith" when they engaged in their market allocation and refusal to deal schemes misses the point of *Silver*. Whether conduct that is a *per se* violation of the antitrust laws can be justified at all is deferred, under *Silver*, until *after* a finding that an implied repeal is necessary to make the statutory scheme work. 373 U.S. at 357. The Fourth Circuit never made that preliminary assessment, and no amount of evidence with respect to respondents' alleged "good faith" will assist any court in making that essential and purely legal determination. Thus, the Fourth Circuit did not even begin to analyze the federal health care legislation with the care or depth required to determine if the implied immunity principles set forth in *Silver* and *National Gerimedical* were satisfied.

The new doctrine of antitrust law created by the Fourth Circuit's decision applies to any field in which federal legislation in any way regulates market entry or contemplates planning activities. Under the Fourth Circuit's decision, any antitrust defendant would be free to argue that his anticompetitive conduct was carried out in good faith under some congressional policy. Not only would statutes that permit private "planning" encourage arguments of this variety, but other equally modest expressions of congressional doubt about the benefits of vigorous competition could be used to justify exemption from normal operation of the antitrust laws.[9] The Court has

[9] Respondents argue that because the statutes cited in the Fourth Circuit's opinion were "replaced" by the 1974 statute (Opp. Brief at 2, 15) this case could not occur again. The opposite is true. If the Fourth Circuit could build upon the thin reeds of encouragement for health care planning found in the statutes it cited, other federal courts can even more easily seize upon the stronger statutory planning or "regulatory" provisions in more recent statutes to carry forward the Fourth Circuit's unprecedented doctrine.

consistently rejected such a case-by-case approach to naked restraints of trade which have long been forbidden by the antitrust laws. *See, e.g., Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940).

III. **CONCLUSION.**

The respondents fail in their attempt to rewrite the Fourth Circuit's opinion and to trivialize the significance of that Court's special rule of reason affirmative defense. The petition for writ of certiorari raises important, far-reaching issues and should be granted.

Respectfully submitted,

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Dated: May 17, 1983

APPENDIX A

Trial Testimony of George Stockbridge

Question (by Mr. Donnelly—counsel for respondents)	Do you know the reason or reasons that the Health Planning Council decided to recommend that Hospital Building Company's operating as Mary Elizabeth Hospital, application for a certificate of need be denied?
Answer (by Mr. Stockbridge)	Yes.
Question (by Mr. Donnelly)	What were those reasons?
Answer (by Mr. Stockbridge)	Well, the first reason, I suppose, would be that the proposed hospital, replacement and expansion project for Mary Elizabeth, had not been a part of, or incorporated into the planning that had been going on by the Joint Long-Range Planning Committee of Wake County in the last year or two. Secondary to that reason, was the concern that this unplanned expansion of this nature would have serious financial impact upon the other local hospitals, and indeed, could threaten their continued operation and the realization of their own plans for expansion and replacement.

(V 2164-5)

No. 82-1633
IN THE
Supreme Court of the United States

October Term, 1982

HOSPITAL BUILDING COMPANY,

Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE; BRIEF AMICUS CURIAE OF THE FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

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Questions Presented

1. Whether actions voluntarily undertaken, unsupervised by any local, state or federal agency and proven to be violative of Sections 1 and 2 of the Sherman Act, may escape antitrust liability on the grounds that they were "primarily" motivated by an intent to avoid a "needless" duplication of health care resources?

2. Whether this Court should sanction a judicially created "special" rule of reason in "limited derogation" of the normal operation of antitrust rules applicable to health planning activities?

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Federation of American Hospitals (FAH) respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioner's request that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.[1] The consent of counsel for the Petitioner to the filing of a brief *amicus curiae* by the Federation of American Hospitals has been obtained. The consent of Respondents' counsel was requested, but refused.

[1]FAH previously appeared before this Court as an *amicus curiae* in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981).

FAH is a nonprofit corporation organized and existing under the laws of the State of New York which represents the interests of approximately 1100 investor-owned acute care hospitals located throughout the United States and its possessions by means of direct membership and affiliated state associations. FAH is the recognized spokesman for such hospitals.

FAH and its members have a direct and immediate interest in this case because its members compete in the health care delivery market throughout the country. Moreover, a substantial portion of FAH members are located in states which have enacted health facility planning legislation pursuant to the National Health Planning and Resources Development Act of 1974. FAH members throughout the country, therefore, will ultimately be affected by this Court's decision.

Respectfully submitted,

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No. 82-1633

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HOSPITAL BUILDING COMPANY,

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TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; and RICHARD URQUHART, JR.,

Respondents.

BRIEF AMICUS CURIAE OF THE FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I. INTEREST OF THE FEDERATION OF AMERICAN HOSPITALS

Amicus Curiae Federation of American Hospitals (FAH) respectfully presents this brief in support of the Petitioner's request that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled matter.

FAH is a nonprofit corporation organized and existing under the laws of the State of New York which represents the interests of approximately 1100 investor-owned acute care hospitals located throughout the United States and its possessions by means of direct membership and affiliated

state associations. FAH is the recognized spokesman for such hospitals.

FAH and its members have a direct and immediate interest in this case because its members compete in the health care delivery market throughout the country. Moreover, a substantial portion of FAH members are located in states which have enacted health facility legislation pursuant to the National Health Planning and Resources Development Act of 1974. FAH members throughout the country, therefore, will ultimately be affected by this Court's decision.

This brief is submitted to assist the Court in deciding whether to issue a writ of certiorari in this case and to rule on the important issues presented herein.

II. SUMMARY OF THE ARGUMENT

At trial, Petitioner was successful in proving a horizontal market allocation scheme and a concerted refusal to deal, *per se* violations of Section 1 of the Sherman Act, as well as conspiracy and attempt to monopolize claims pursuant to Section 2 of the Sherman Act. The Fourth Circuit reversed the judgment, holding that Respondents were entitled to defend their actions using a "special rule of reason" in "limited derogation of the normal operation of the antitrust laws." The Fourth Circuit's holding was based upon its view that, although the conduct in question was "merely encouraged and authorized" and not mandated by any governmental agency or statute, such conduct was "desirable" and, therefore, could be justified by an "affirmative defense" which would allow it to escape antitrust liability if the challenged activities were undertaken in "good faith" and their "actual and intended effect lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities."

This Court must grant review of the Fourth Circuit's decision. To allow the decision to stand will authorize the federal courts to create "special" rules of reason and new defenses whenever they believe such rules or defenses are "desirable." Such a free rein would, in effect, destroy the objectivity, predictability and litigation efficiency of the *per se* antitrust rules. Moreover, the Fourth Circuit's holding that health care planning activities are to be protected by special antitrust rules conflicts with prior holdings of this Court.

III. ARGUMENT

A. Introduction.

Petitioner is a for-profit corporation operating Mary Elizabeth Hospital ("Hospital") in Raleigh, North Carolina. In 1970 it was acquired by a national investor-owned hospital company which subsequently announced plans to expand Hospital and filed a certificate of need application with the appropriate state authorities to replace Hospital with a new, larger investor-owned facility in Raleigh.

Following the announcement of Petitioner's plans to construct a new hospital, Respondents and other unnamed co-conspirators undertook action to oppose construction of the new facility. At the conclusion of a six-week trial, a jury found that Respondents' acts violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and awarded damages based, *inter alia*, on the fact that Respondents' acts caused a 51 month delay in the construction.

The Fourth Circuit reversed the jury's verdict. It held that Respondents should have been able to take advantage of a "special rule of reason" in "limited derogation of the normal operation of the antitrust laws" based upon the "relevant federal health care legislation," which "derogation" was to take the form of an "affirmative defense" to the *per*

se antitrust violations the jury found. 691 F.2d 678, 686 (4th Cir. 1982). This "affirmative defense" will allow Respondents to escape antitrust liability if they are able to prove that their challenged conduct was undertaken (1) in good faith; and (2) its "actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities." 691 F.2d at 686.

In so holding, the Fourth Circuit noted that Respondents' activities were not mandated or required by any statute or regulation, but were "merely encouraged and authorized." In this context, the Fourth Circuit found that the critical question in applying its "special rule of reason" would be whether the "duplication of resources . . . is in fact 'needless' duplication, a question to be determined by the fact finder in relation to the health care needs of the consumer public in the market area at the time in question, objectively assessed and not in relation to the economic or other needs of the 'planners' either objectively or subjectively assessed." *Id.*

A similar analysis was applied to the Petitioner's Section 2 attempt to monopolize and conspiracy to monopolize claims. The Fourth Circuit held that Respondents could defeat such claims by proving their acts were "motivated by the intent to avoid 'needless' duplication rather than specific intent to monopolize." 691 F.2d at 690.

The Fourth Circuit's holdings are a radical departure from precedents established by this Court in other cases addressing the application of *per se* rules generally, and more specifically, the application of *per se* antitrust rules to the health care industry. Moreover, the Court of Appeals' decision was not based upon existing Supreme Court holdings with respect to *per se* rules, but instead is an attempt to create

an exemption to the application of *per se* rules which this Court has already determined is more properly addressed to Congress.

B. There Can Be No "Limited Derogation" of *Per Se* Rules.

This Court has repeatedly held that horizontal market allocation schemes and concerted refusals to deal, or group boycotts, such as those proved by Petitioner herein, are *per se* violations of the antitrust laws. *See, e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958); *Timken Roller Bearing Company v. United States*, 341 U.S. 593, 974-975 (1951); *Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 465-469 (1941). Because of the pernicious affect of such conduct on competition, acts constituting horizontal market allocations or concerted refusals to deal are conclusively presumed to be unreasonable, and, therefore, illegal, without elaborate inquiry as to the precise harm they have caused or the business justifications for their use. *Northern Pacific Railway*, 356 U.S. at 5. Courts faced with such conduct, therefore, need not hear any justification for the reasonableness of the methods pursued by those engaging in such activity. *Fashion Originators Guild*, 312 U.S. at 468.

These time-tested rules are designed to avoid extensive inquiry into the reasonableness of a challenged business practice, allow for certainty in business operations and for litigation efficiency, and apply in spite of the fact that those pursuing such conduct might be able to prove to a finder of fact that their conduct was in fact reasonable. *United States v. Topco Associates*, 405 U.S. at 609; *Continental*

TV, Inc. v. GTE-Sylvania, Inc., 433 U.S. 36, 50, n. 16 (1977).

Recently this Court held that the *per se* principles applicable to commerce generally also had specific application to the health care industry. In *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466 (1982), this Court specifically held that *per se* rules need not be rejustified for the health care industry, and any attempt to do so would indicate a "misunderstanding of the *per se* concept." 102 S.Ct. at 2477. *See also United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 224, n. 59 (1940).

When the Fourth Circuit's decision is read in the context of the foregoing standards as enunciated by this Court, it is clear that the Fourth Circuit's decision is unprecedented as a matter of law, unwarranted as a matter of policy and must be reviewed and reversed by this Court.

1. The Fourth Circuit's Decision Is Unprecedented as a Matter of Law.

The Fourth Circuit failed to cite any applicable precedent for its holding, and research discloses that there has not been a single decision by this Court, or any Court of Appeals, applying a "special rule of reason" to proven horizontal market allocation schemes and concerted refusals to deal. The Fourth Circuit did, however, making a passing reference to *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-361 (1963) and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 393, n. 18 (1981). 691 F.2d at 685-686.

In *Silver*, this Court was called upon to determine whether the Securities Exchange Act of 1934 impliedly repealed the antitrust laws as a result of a "plain repugnancy" between the regulatory scheme contemplated by the Securities Exchange Act and the antitrust laws. If a "plain repugnancy"

existed, the antitrust laws would have been limited to the extent necessary to make the regulatory scheme work. *Silver*, 373 U.S. at 357.

In *Silver*, the Court found that although Congress had *mandated* action by the Securities Exchange Commission, the particular action under review (withdrawal of private wire connections between broker dealers and Exchange members) was not within the scope of the Congressional mandate and, therefore, was subject to antitrust review. The *Silver* decision did not discuss any limitation of *per se* rules and cannot serve as precedent, in any fashion, for the Fourth Circuit's decision herein.

The Fourth Circuit's reference to *National Gerimedical Hospital and Gerontology Center* is similarly unsupportive. In *National Gerimedical*, this Court reviewed health planning activities which were, as the actions under review herein, neither compelled nor approved by any governmental regulatory body. This Court characterized the challenged activities in *National Gerimedical* as "a spontaneous response" to the finding of an advisory planning body that there was a "surplus" of acute care hospital beds in the area. This Court held, in spite of Respondents' reliance on specific federal planning legislation (as opposed to general planning legislation at issue herein), which legislation specifically stated that planning was necessary "in order to eliminate unnecessary duplication of hospital services," 42 U.S.C. § 300*l*-2(a)(4), that there was no implied repeal of the antitrust laws with respect to such conduct. 452 U.S. at 391. This Court concluded that "although respondents may well have acted here with only the highest of motives in seeking to implement the plans of the local [planning agency], they cannot defeat petitioner's antitrust claim by the assertion of immunity from the requirements of the Sherman Act . . ." 452 U.S. at 393.

Footnote 18 to the decision, cited by the Fourth Circuit, states:

> "Nevertheless, because Congress has remained convinced that competition does not operate effectively in some parts of the health care industry . . . we emphasis that our holding does not foreclose future claims of antitrust *immunity* in other factual contexts." (Emphasis added).

452 U.S. at 393, n. 18. The footnote also made reference to comments of the United States as *amicus curiae* that certain activities must, by implication, be immune from antitrust attack ". . . if HSAs and state agencies are to exercise their authorized powers."

In this case, Respondents made no showing that their "planning" activities were mandated by any particular statute, the result of specific cooperation with a Health Systems Agency in carrying out the Health Systems Agency's own statutory responsibilities, or that their activities were supervised in any way by any federal or state agency. Accordingly, *National Gerimedical* footnote 18 cannot be read to support a holding limiting application of established *per se* rules to voluntary, unsupervised conduct, proven to be a part of a horizontal market allocation conspiracy and a concerted refusal to deal. To do so would in essence reverse this Court's decision in *National Gerimedical* and sanction conduct this Court has already found is not protected from antitrust liability.

In summary, the Fourth Circuit's decision represents a major alteration of established precedents with respect to *per se* rules, including the specific application of those rules to the health care industry. Accordingly, this Court should review the decision of the Fourth Circuit.

2. The Fourth Circuit's Decision Is Unwarranted as a Matter of Policy.

The effect of the Fourth Circuit's decision is to allow courts to hold that actions constituting *per se* violations of the antitrust laws, ostensibly based upon Congressional "encouragement," may be justified if their "intended affects" lay within those a court believes Congress "envisioned" in spite of the fact that the "statutes relied upon" may not be "altogether clear." 691 F.2d at 685-686. Such a holding would create precisely the type of complex litigation that the *per se* rules were designed to avoid. It will require and permit federal courts throughout the country to divine, individually, what Congress may have envisioned in a large variety of statutes, prefaced by general policy goals such as a desire to "reduce costs." It will allow a jury to determine whether compliance with that "envisionment" was reasonable in light of the "needs of the consumer public in the market area at the time in question, objectively assessed, and not in relation to the economic or other needs of the 'planners,' either objectively or subjectively assessed." Cf. 691 F.2d at 686. It is this type of litigation of alleged *per se* violations which this Court has consistently rejected. *E.g., Fashion Originators Guild, supra* (rejecting a defense to *per se* liability on the grounds that the acts were reasonable and necessary to protect the "manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four."); *Klors, Inc., supra* (rejecting a defense to *per se* liability that the conduct was necessary in order to allow market entry); *Timken Roller Bearing Company v. United States*, 341 U.S. at 599 (rejecting a defense that the practice was necessary in view of current foreign trade conditions).

As this Court has previously noted with respect to *per se* violations, what may be reasonable conduct today, may, through economic and business changes, become unreasonable tomorrow. Once established, however, the market conditions resulting from unchecked anticompetitive conduct may continue unchanged because of the absence of the competitive influence. Cf. *United States v. Trenton Potteries Company*, 273 U.S. 392, 397 (1927); *White Motor Company v. United States*, 372 U.S. 253, 265, n. 2 (1963); (Brennan, J. concurring). If Respondents are able to convince a jury that their actions were prompted by a desire to avoid a "duplication of resources," Respondents will have been successful in diminishing the number of hospitals in the market area, limiting the freedom of physicians and patients to select the hospitals they most desire to use, limiting the market available to suppliers and, more importantly, eliminating a direct competitor now and for the future.

Finally, this Court has repeatedly held that arguments against application of *per se* rules are to be directed not to the courts, but to Congress. Only Congress can decree *per se* rules inapplicable in some or all situations. *United States v. Topco*, 405 U.S. at 609, n. 10. Recently this Court reaffirmed this holding by noting that any limitation of *per se* rules in the health care industry in particular was for Congress, not the judiciary. *Arizona v. Maricopa County Medical Society*, 102 S.Ct. at 2479.

C. The Fourth Circuit's Decision Regarding Specific Intent in Section 2 Claims Is Inconsistent With Established Antitrust Standards.

Petitioner was able to prove at trial both an attempt to monopolize and a conspiracy to monopolize, violations of Section 2 of the Sherman Act. In spite of the jury's findings,

the Fourth Circuit held that a "defense" existed to these monopoly claims, which it characterized as "analogous" to a "legitimate business purpose" defense. 691 F.2d at 690. The Fourth Circuit's holding regarding proven Section 2 violations, however, is inconsistent with established antitrust standards in that legitimate business purpose is not a "defense" to a Section 2 violation, and, assuming such a defense did exist, an intent to avoid "needless" duplication would neither satisfy its requirements, nor be consistent with the policies embodied in the antitrust laws.

1. Legitimate Business Purpose Is Not a "Defense" to Section 2 Offenses.

Specific intent to monopolize is an element in both attempt to monopolize and conspiracy to monopolize offenses. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. Columbia Steel Co.*, 334 U.S. 495, *rehearing denied*, 334 U.S. 862 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Swift & Co. v. United States*, 196 U.S. 375 (1905). The Fourth Circuit, however, labeled the purported existence of a legitimate business purpose as a "defense" to Section 2 claims. Referring to *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) and *American Football League v. National Football League*, 205 F.Supp. 60 (D.Md. 1962) *aff'd.* 323 F.2d 124 (4th Cir. 1963), the Fourth Circuit said: "Proof that the transactions in question were primarily motivated by legitimate business purposes rather than by specific intent to monopolize is a defense to both attempt to monopolize and conspiracy to monopolize." 691 F.2d at 690.

The decisions cited by the Fourth Circuit do not construe legitimate business purposes to be a "defense" to alleged

Section 2 claims. In *Times-Picayune*, 345 U.S. at 627, this Court said that the evidence supported the District Court's determination that the defendants' activities were "predominantly motivated by legitimate business aims," and thus the record did not support the requisite specific intent to sustain an alleged attempt to monopolize. Similarly, in *American Football League*, there was no articulation of a legitimate business purpose "defense".

In spite of this lack of precedential support, the Fourth Circuit espouses the existence of such a defense to proven Section 2 attempt to monopolize and conspiracy to monopolize claims. This Court should grant certiorari to consider the issue of whether a legitimate business purpose is a "defense" to a finding of defendant's specific intent to monopolize, or whether a legitimate business purpose is merely evidence to refute a plaintiff's attempt to prove the requisite specific intent.

2. Intent to Avoid "Needless" Duplication Is Neither a "Legitimate Business Purpose" Nor Consistent With the Policies of the Antitrust Laws.

If a legitimate business purpose "defense" exists, it would, of necessity, require proof that the acts of Respondents were unilaterally undertaken in their own best interests to compete in the relevant health care market.[2] The Fourth Circuit, however, would not require that proof, but would instead require a jury to reject allegations of Section 2 violations by finding, as a matter of fact, that, in spite of a specific intent to monopolize, Respondents were acting out

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[2]The Fourth Circuit seemingly concedes that application of a legitimate business purpose standard to Respondents' conduct would not rehabilitate that conduct. In this regard the Fourth Circuit states, "[a] literal application of the legitimate business purpose defense . . . does not readily lend itself to application" to health care planners. 691 F.2d at 690.

of a motivation to avoid a "needless duplication" of health care resources. This "needless" duplication would be "gauged by the fact finder in relation to the health care needs of the consumer public in the market area at the time in question." 691 F.2d at 686. The Fourth Circuit standard, therefore, requires consideration of the entire market *and* those elements within it which are "needless." Such a standard finds no support in the case law.

The Fourth Circuit standard means that a jury would, in effect, determine what was, or was not, "needless duplication." In this context, the would-be competitor seeking to enter the market, or an existing competitor (such as Petitioner herein) desiring to expand its productive capacity, would always be the competitor potentially constituting the "needless duplication." The Fourth Circuit standard, therefore, in addition to creating a vehicle limiting, rather than promoting, competition, contains an inherent bias in favor of those already in the market at the expense of a new or expanding competitor. Such a bias is also unsupported by any decision of this Court.

Finally, the effect of the Fourth Circuit's holding with respect to Petitioner's Section 2 claims, therefore, is to delegate to the courts, rather than the marketplace, a determination as to who should or should not be in the market, and who will be allowed to successfully compete in that market. This approach is antithetical to the premise of the antitrust laws that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . ." *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 4-5 (1958).

The fact that the challenged actions take place in the context of "health planning" does not mandate a different conclusion. Indeed, this Court has already determined that

the competitive mandates of the antitrust laws are not suspended in the context of "health planning." *Arizona v. Maricopa County Medical Society, supra*, and *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, supra*. Moreover, to the extent that Congress has specifically mandated health planning to governmental action or supervision of otherwise private conduct (*see National Gerimedical, supra*, Note 18) that type of governmental involvement is not at issue herein.

IV. CONCLUSION

Health care competitors are, by virtue of this Court's recent rulings, increasingly cognizant of the antitrust implications and significance of their marketplace activities. The decision of the Fourth Circuit should be reviewed because the decision is inconsistent with the prior rulings of this Court and is contrary to accepted antitrust principles. If not reviewed by this Court, the Circuit Court's decision will have the undesirable effects of creating confusion, uncertainty and increased antitrust litigation in the health care industry. Because of the importance of the health care industry to both the nation's economy and its citizens' welfare, this Court should grant certiorari to review the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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Nos. 82-1633 and 82-1762

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL BUILDING COMPANY, PETITIONER

v.

TRUSTEES OF THE REX HOSPITAL, ET AL.

TRUSTEES OF THE REX HOSPITAL, ET AL., PETITIONERS

v.

HOSPITAL BUILDING COMPANY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

No. 82-1633:

1. Whether the court of appeals erred in implying an exemption from the Sherman Act (15 U.S.C. 1 and 2) for private health care providers who conspire to block the construction of competing hospital facilities in a "good faith" effort to prevent needless duplication of facilities in furtherance of national health planning goals, where the proposed facilities actually were not needed.

No. 82-1762:

1. Whether the district court abused its discretion by declining to submit a separate special verdict question to the jury on the issue of plaintiff's preparedness to expand, when the general instructions correctly framed that issue and the written questions that were submitted to the jury permitted the jury to resolve it in favor of either plaintiff or defendants.

2. Whether the injuries plaintiff sustained because of its inability to expand its business are "antitrust injuries" as defined in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), where its inability to expand was proximately caused by defendants' unlawful exclusionary conduct.

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HOSPITAL BUILDING COMPANY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

[1] This brief also reflects the views of the Federal Trade Commission.

STATEMENT

1. Petitioner Hospital Building Company ("HBC") operates for profit a proprietary hospital in Raleigh, North Carolina, the Mary Elizabeth Hospital. Respondents are a public, non-profit hospital, which is also located in Raleigh, and two of its officers. In 1970, HBC announced that it would replace Mary Elizabeth's out-moded 49-bed facility with a modern 140-bed hospital (Pet. App. 3a-4a). The two other, larger hospitals in Raleigh, respondent Rex[2] and Wake County Memorial Hospital ("Wake"), were also of the view that the Raleigh area needed more beds, but thought that they should provide them: in May, 1971, they proposed adding 353 beds themselves, with only 11 new beds for Mary Elizabeth (*id.* at 4a).[3]

Under North Carolina law, hospitals seeking to expand needed to obtain the approval of the North Carolina Medical Care Commission ("MCC"). In November, 1971, HBC applied to the MCC for authority to build its new hospital. The MCC in turn referred the application to the Health Planning Council for Central North Carolina ("Planning Council") for an initial

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[2] Respondents Barnes and Urquhart were respectively the chief executive officer and vice-chairman of respondent Trustees of Rex Hospital, and we shall refer to the three respondents collectively as "Rex."

[3] The proposal took the form of a report by the Joint Long-Range Hospital Planning Committee of Wake County, formed by Rex and Wake in 1969. When the report was published Rex had 347 beds (Br. for Appellants (Rex) in the court of appeals, 9) and Wake, owned by Wake County, had 340 beds (Pet. App. 3a-4a).

recommendation (*id.* at 4a).[4] The Planning Council recommended that the MCC deny the Mary Elizabeth application (*ibid.*). Four months later, after an evidentary hearing in which Rex and Wake participated and expressed their opposition, the MCC on June 30, 1972, approved the Mary Elizabeth application (*id.* at 5a).[5] On July 28, 1972, the Planning Council appealed the MCC's decision to the Wake County Superior Court (*ibid.*). Before the case came to decision, however, the North Carolina Supreme Court held that the state's certificate of need law violated the state constitution. *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973).

With state legal barriers to construction removed, HBC asked the Blue Cross-Blue Shield Association of North Carolina ("Blue Cross-Blue Shield") for a contract under which it would reimburse based on actual charges. Blue Cross-Blue Shield said it would reimburse expenses incurred at Mary Elizabeth only at a lower rate based on a percentage of equity (Pet. App. 5a). It also refused to recognize certain HBC rate increases (Br. in Opp. 10). Ultimately HBC

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[4] The Planning Council was formed in 1964 pursuant to the 1964 Amendments to the Hill-Burton Act, 42 U.S.C. (& Supp. V) 247c, 291-291o, and later designated a "local health planning council" pursuant to the Comprehensive Health Planning and Public Health Services Amendment of 1966 (Pet. 6 n.9; Br. in Opp. 4). Under both statutes, the council was to advise state planning agencies on health facilities. Membership on the council was entirely voluntary, and its role was purely advisory, since no provision of either statute contemplated enforcement of its recommendations. See also page 12 note 15, *infra*.

[5] The MCC gave its initial approval on May 5, 1972, but the Planning Council sought rehearing and final approval did not occur until June 30, 1972 (Pet. App. 5a).

signed a contract with Blue Cross-Blue Shield. Construction of the hospital finally started in 1977, and it opened in that year (Pet. App. 6a).

2. In October 1972, HBC sued Rex under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2). In its amended complaint[6] HBC alleged that the respondents and their co-conspirators[7] violated Sections 1 and 2 of the Sherman Act by conspiring to prevent HBC from expanding its hospital facilities; that respondents devised a scheme involving bad faith efforts to block authorization of the expansion, tactics to hold up implementation of petitioner's plans once authorization was obtained, and malicious instigation of adverse publicity and general public antipathy; and that the purpose of this conspiracy was to control the number of hospital beds, allocate patients and otherwise illegally restrain competition for medical-surgical hospital services in the Raleigh area. In addition, HBC alleged that the respondents had engaged in the following specific abuses of the administrative and judicial processes of North Carolina: manipulation of the Planning Council so that it recommended rejection of HBC's application; protraction without good cause of proceedings before the MCC; conspiring with Ms. Denson, an Assistant Attorney General of North

[6] The amended complaint was filed after the defendants moved to dismiss the original complaint for lack of subject matter jurisdiction.

[7] The named co-conspirators were Wake County Hospital System, Inc., which operates Wake; William F. Andrews, Sr., Administrator of Wake; and I.B. Holley, former chairman of the Planning Council. HBC subsequently named as additional co-conspirators Blue Cross-Blue Shield; the Planning Council; Assistant Attorney General of North Carolina Christine Denson; and the Joint Long Range Hospital Planning Committee of Wake County.

Carolina; and groundless and dilatory appeal of the MCC decision to state court (Pet. App. 4a-5a). HBC further alleged that after HBC obtained authorization to expand, Rex sought to impede construction by conspiring with Blue Cross-Blue Shield to have that insurer demand different and more onerous terms from HBC than from Wake and Rex (*id.* at 5a-6a).

The case was tried before a jury in 1980.[8] HBC presented evidence to prove the plan to prevent, and then to impede, its expansion program. The court instructed the jury that the alleged conspiracy to prevent HBC's expansion would be illegal per se under Section 1 of the Sherman Act (Pet. App. 12a). To clarify the verdict, the court directed the jury to answer seven special verdict questions (Cross-Pet. App. 1a-3a). The jury answered all of them in favor of HBC and found the defendants liable for approximately $2,440,000. The court then trebled this amount pursuant to 15 U.S.C. 15.

The court of appeals reversed and remanded for a new trial (Pet. App. 1a-22a). The court acknowledged that the anticompetitive acts allegedly committed by Rex and its co-conspirators "are generally *per se* violations of the antitrust laws" (Pet. App. 6a-7a).[9] Nonetheless, it held that the district court

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[8] Much of the eight-year delay between complaint and trial was occasioned by the district court's dismissal of the complaint for failure adequately to allege involvement with interstate commerce. The court of appeals affirmed. 511 F.2d 678. This Court, however, unanimously reversed and remanded for further proceedings. *Hospital Building Company* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976).

[9] Respondents did not expressly challenge in the court of appeals the sufficiency of the evidence of their agreement with others to block the construction of petitioner's new hospital (see Pet. App. 2a).

erred in giving a per se instruction because it construed several federal health care statutes, which encouraged participation by local hospitals and others in planning to avoid needless duplication of health facilities, to be "in limited derogation of the normal operation of the antitrust laws" (*id.* at 12a). Accordingly, the court fashioned a "very narrow 'rule of reason'," which "is simply that planning activities of private health services providers are not 'unreasonable' restraints under § 1 if undertaken in good faith and if their actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities" (*id.* at 10a). The court stated that " 'planning' under this special rule of reason is not 'reasonable' if its purpose or effect is only to protect existing health care providers from the competitive threat of potential entrants into or expanders within the same 'market' " (*id.* at 11a). Moreover, the fact-finder is to determine whether the duplication of facilities sought to be avoided by "planning" is "needless" or "needful" by reference to the needs of the consumer (*id.* at 12a).[10]

In addition to remanding for a new trial under this "rule of reason" standard, the court also addressed other issues relevant to that trial. First, on the

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[10] The court also held that defendants were similarly entitled to a new trial on the Section 2 claims (15 U.S.C. 2) in order to show that they were motivated by a desire to avoid needless duplication, and that the instruction the district court gave on the Section 2 claims—that good motives cannot excuse a violation—deprived defendants of their right to establish that defense. Pet. App. 21a.

sham exception to the *Noerr-Pennington* doctrine[11] the court, without discussing the sufficiency of the evidence, referred to one portion of the district court's instruction as "unnecessarily broad" and described another sentence as simply "erroneous" (Pet. App. 15a).[12] Second, it held (*id.* at 17a-20a) that there was sufficient evidence for the jury to find that the several-year delay in opening HBC's new hospital was proximately caused by Rex's conduct and that, if that conduct was found to violate the special rule of reason, the damages caused by the delay were an "antitrust injury" within the meaning of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Finally, the court decided that the district court had not abused its discretion in declining to submit to the jury a special verdict question on HBC's preparedness to enter the Raleigh market in 1972 (Pet. App. 20a).

DISCUSSION

A. *No. 82-1633*

Under its self-styled rubric of a "special rule of reason," the court of appeals in effect created a new implied antitrust immunity that directly conflicts with this Court's teachings on the rule of reason and on implied antitrust immunity. Its error is particularly

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[11] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[12] The court also held that the evidence concerning Ms. Denson, Assistant Attorney General of North Carolina, showed only that at the Attorney General's behest she helped the Planning Council present its case to the MCC, and thus was insufficient to warrant submitting to the jury the question of her participation in the conspiracy (Pet. App. 16a).

significant since it occurs in the area of health care, one of the largest and fastest growing segments of the economy.[13] Accordingly, this Court should grant HBC's petition to correct the court of appeals' errors.

1. The jury found Rex liable for conspiring with Wake and others to exclude a competitor by means of a boycott and abuse of the administrative and judicial processes of North Carolina. The court of appeals itself recognized that such conduct is ordinarily illegal per se under Section 1 of the Sherman Act (Pet. App. 6a-7a). As this Court has repeatedly stated, group boycotts instigated by horizontal competitors that seek to bar or burden another competitor's access to a valuable resource are without redeeming competitive benefit. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *United States* v. *General Motors Corp.*, 384 U.S. 127, 145 (1966). Similarly, there can be little doubt that a conspiracy by competitors to exclude a rival through abuse of a state's regulatory and judicial processes is "inconsistent with the free-market principles embodied in the Sherman Act* * *." *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966). Such "[p]redation by abuse of governmental procedures" (R. Bork, *The Antitrust Paradox* 347 (1978)) can never benefit competition and transfers from public to private hands the power to limit competition. *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941).

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[13] In 1981, estimated expenditures for health care in the United States were $287 billion, or 9.8% of the gross national product. Gibson & Waldo, *National Health Expenditures, 1981*, 4 Health Care Financing Rev. No. 1 at 1 (Sept. 1982). The Department of Health and Human Services estimates that in 1982 the health care industry grew to $322 billion, or 10.5% of the gross national product.

Nonetheless, the court of appeals thought that Congress' desire to encourage hospital participation in local health care planning "is in limited derogation of the normal operation of the antitrust laws" and thus requires a "special rule of reason" analysis (Pet. App. 12a). This novel "special rule of reason" does not exist other than in the decision below. The court's analysis is simply a misapplication of established rule of reason principles cloaked in ill-fitting garb. As this Court stated in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691 (1978): "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." The Fourth Circuit's "special rule," however, would focus inquiry not on the competitive impact of the restraint, but on the "good faith" of the defendants and on whether the competition they admittedly suppressed was "needless" and thus not in the public interest. This is not a recognizable rule of reason inquiry. As the Court also stated in *Professional Engineers*, "the purpose of the analysis * * * is not to decide whether a policy favoring competition is in the public interest * * *. Subject to exceptions defined by statute, that policy decision has been made by the Congress" (435 U.S. at 692; footnote omitted).

The court of appeals' "special rule" is all the more unsound in light of this Court's recent decision in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982). There, the court of appeals had held that since competition does not work very well in the health care industry, courts should judge on a case by case basis the reasonableness of prices fixed by physicians. This Court reversed, noting that the court

of appeals' decision was inconsistent with Section 1. The Court held that the antitrust laws are fully applicable to the health care industry and prevent courts from deciding whether competition is suppressed to a socially desirable level. *Id.* at 348-351. It is equally inconsistent with the antitrust laws for a district court or jury, as required by the Fourth Circuit's rule, to determine whether the hospital capacity conspiratorially suppressed was "needful" or "needless." Indeed, it would require the judge and jury to make the sort of decisions made by expert regulatory agencies and traditionally shunned by courts. See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

2. It may well be, as respondents argue (Br. in Opp. 15, 20, 25), that the court of appeals' "special rule" terminology merely signified an implied antitrust immunity. The court's discussion of the "special rule of reason" (Pet. App. 7a-13a; *id.* at 10a-11a) is couched in the language of implied immunity and relies on two cases involving such claims, *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378 (1981). If so, the court badly misconstrued the law of implied antitrust immunity.

Exemptions from the antitrust laws are to be construed narrowly and are limited to the scope clearly intended by Congress. See, *e.g.*, *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982); *Abbott Laboratories* v. *Portland Retail Druggists Association*, 425 U.S. 1 (1976); *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973). Indeed, in *National Gerimedical* this Court rejected the argument, virtually identical to that adopted by the court of appeals (Pet. App. 10a), that private ex-

clusionary conduct is impliedly immune from the antitrust law if it is "only intended to further the purposes of [national health care legislation]" (452 U.S. at 388). It held instead that " 'only * * * a convincing showing of clear repugnancy between the antitrust laws and the regulatory system' " can justify an implied immunity, and immunity will not be implied unless it is " 'necessary to make the [subsequent law] work, and even then only to the minimum extent necessary' " (*id.* at 388-389). As this Court further explained, an implied immunity cannot be justified except where there is a "specific conflict between" the legislation under which immunity is claimed and the antitrust laws. *Id.* at 393. And there is no "specific conflict" unless the regulatory statute requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws. *Id.* at 389. Accord, *Silver* v. *New York Stock Exchange, supra; United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

Application of the test enunciated in *National Gerimedical* shows that there is no "specific conflict" between the health care statutes the court of appeals relied on [14] and the antitrust laws. The anticom-

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[14] The court of appeals generally cited six statutes (Pet. App. 7a-11a) as the basis for an implied antitrust immunity: the Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040; the Hospital and Medical Facilities Amendments of 1964 to Hill-Burton Act, Pub. L. No. 88-443, 78 Stat. 447; the Comprehensive Health Planning and Public Health Services Amendments of 1966, Pub. L. No. 89-749, 80 Stat. 1180; the Partnership for Health Amendments of 1967 to the Hill-Burton Act, Pub. L. No. 90-174, 81 Stat. 533; the Heart Disease, Cancer, Stroke, and Kidney Disease Amendments of 1970, Pub. L. No. 91-515, 84 Stat. 1297; and the Medical

petitive conduct at issue here—an effort to exclude a competitor by an abuse of the North Carolina administrative and judicial processes and a boycott with Blue Cross-Blue Shield—is a clear violation of Section 1. And nothing in the text or legislative history of the health care statutes the court of appeals relied on indicates a congressional intent to require or authorize parties to engage in this sort of exclusionary conduct. Indeed, those statutes did not direct anyone—even governmental agencies—to limit entry. Although Congress desired to avoid "needless duplication" of hospital resources, it sought to achieve that goal through voluntary and precatory means.[15] Moreover, when Congress did adopt entry regulation in 1974 in the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 ("NHPRDA"), it granted state agencies —not private parties—authority to deny entry and provided procedural safeguards for the exercise of that power. See *National Gerimedical*, *supra*, 452 U.S. at 385. In light of that carefully delimited

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Facilities Construction and Modernization Amendments of 1970, Pub. L. No. 91-296, 84 Stat. 336. As the court observed, "[n]one of the above mentioned health planning legislation contains an express exemption from the antitrust laws" (Pet. App. 9a).

[15] These diverse statutes provided funds to states for hospital construction, medical research and health planning. Each required, as a condition of federal funding, planning by the state and receipt by state officials of advice from broadly constituted advisory bodies. Participation by hospitals and other health care providers, however, was entirely voluntary. These statutes did not authorize anyone to enforce any planning decision by preventing (or requiring) the construction of a health care facility. Implementation of all planning decisions was to be achieved strictly by voluntary cooperation.

grant, it would be especially anomalous to conclude that Congress intended in enacting the earlier legislation to imply authorization for private parties to engage in unsupervised entry regulation. See S. Rep. No. 93-1285, 93d Cong., 2d Sess. 52 (1974).[16]

3. The court of appeals' erroneous "special rule of reason" merits correction now, for it has the capacity for substantial mischief. It confuses the law relating to both the rule of reason and implied antitrust immunity in the vast and growing health care industry, where the lower courts appear to have had considerable difficulty in applying antitrust law correctly. See *National Gerimedical, supra; Arizona* v. *Maricopa County Medical Society, supra*; *Hyde* v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), cert. granted, No. 82-1031

[16] The court of appeals suggested (Pet. App. 9a-10a), as do respondents (Br. in Opp. 24), that private health care providers might be deterred from participating in "planning" activities unless their activities are immune from antitrust scrutiny. But the gravamen of petitioner's complaint concerns, not the defendants' planning activities, but their efforts to enforce their plans by anticompetitive exclusionary conduct. Private parties may participate in planning and lend their expertise to local planning entities (Pet. App. 10a) without engaging in conduct designed to bar others from competing. For the same reason, respondents' argument that their conduct it "identical in principle to the good faith 'cost-saving cooperation among providers' [that] this Court suggested [might] be immune in footnote 18 of *National Gerimedical*" (Br. in Opp. 24; footnote omitted) misses the mark. The voluntary cooperation contemplated by the Congress in the NHPRDA and discussed by the Court in *National Gerimedical* (452 U.S. at 384-385) is entirely different from the conduct challenged in this case—a concerted effort to deny a competitor the opportunity to compete.

(March 7, 1983).[17] Moreover the court of appeals' decision risks spilling over into other regulated areas of the economy and further clouding sound antitrust analysis.

It is, of course, true, as respondents state (Br. in Opp. 16), that the court of appeals' ruling is interlocutory. This Court, however, has granted plenary review of interlocutory decisions that present an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern & E. Gressman, *Supreme Court Practice*, 301 (5th ed. 1978); *e.g., Arizona* v. *Maricopa County Medical Society, supra*, 457 U.S. at 339. This case satisfies these criteria. The Fourth Circuit's new "special rule of reason" raises an issue of general importance. That issue is fundamental to the further conduct of the case, for the court of appeals has directed that on remand the district court permit defendants to raise the "special rule of reason" defense (Pet. App. 13a). Finally, the issue is clearly presented: the court of appeals identified only the district court's per se instruction as reversible error (*ibid.*). Although the court also disapproved of portions of the district court's *Noerr-Pennington* instructions[18] and found insufficient evidence to connect the

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[17] Thus, although the statutes involved here have now been superseded (Br. in Opp. 17) the court's flawed method of analysis remains troubling, for the court would doubtless apply it to the NHPRDA and other currently governing health statutes.

[18] It is, of course, axiomatic that jury instructions must be judged as a whole, and not in particular isolated sentences. *United States* v. *Park*, 421 U.S. 658, 674 (1975). Since the court did not reverse on this basis, however, it felt no necessity

Assistant Attorney General of North Carolina to the alleged conspiracy (Pet. App. 15a-17a), it did not identify these as reversible errors, but only as matters that should be addressed on remand, since "the matter must be retried" because of the per se instruction.

4. Similar considerations counsel in favor of granting the petition to review the court of appeals' holding under Section 2 (attempt to monopolize and conspiracy to monopolize). The court transposed its novel Section 1 "good intentions" defense to the context of Section 2 analysis and concluded (Pet. App. 21a) that "defendants [have the] right to prove that they were motivated by intent to avoid 'needless' duplication rather than specific intent to monopolize." Since the district court's jury instructions precluded this defense, the court of appeals reversed.

Where defendants have engaged in unambiguously exclusionary acts, such as those involved here, with the intent to achieve monopoly power or to exclude competition, the mens rea element of the offense of attempt or conspiracy to monopolize has been established. See, *e.g.*, *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *United States* v. *Griffith*, 334 U.S. 100, 105 (1948). And this is essentially what the district court charged the jury (Pet. App. 30a-

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to decide whether the *Noerr-Pennington* instructions as a whole required reversal. In fact the instructions read in their entirety (see App., *infra*) informed the jury, in conformity with *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), that conduct before courts or agencies loses its constitutional protection and antitrust immunity if it is both abusive of courts or agencies and intended to harm a competitor. Finally, it would be open to the court of appeals on remand from this Court to decide whether the insufficiency of the evidence of the state official's involvement in the conspiracy (see page 7 note 12 *supra*) was reversible error.

33a). While a legitimate business purpose may negate the specific intent required in attempted monopolization cases (see, *e.g.*, *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626-627 (1953); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 532-533 (1948)), that is not the defense the court of appeals addressed. Rather, the court created a new version of the legitimate business purpose doctrine for use in the health care industry (Pet. App. 21a). Under this freshly-minted standard a defendant could seek to excuse his anticompetitive behavior simply because he believed his acts were in furtherance of the statutory goal of eliminating "needless duplication." But, as we discuss above, when a decision on the "need" for health care expansion is called for, it is to be made by the public bodies created for that purpose.[19] Private entities, such as defendants, may participate in that process but are granted no license either to abuse the process or to engage in violations of the antitrust laws to advance their own objectives. The decision below, which would permit a party to defend on this basis, is an unwarranted departure from existing law and should be reversed.

B. *No. 82-1762:*

Rex's contentions that the court of appeals erred in affirming the district court's refusal to submit a special written question on HBC's preparedness to enter the market and in allowing recovery of damages alleged to be unrelated to antitrust injury (82-1762 Cross-Pet. (i)) are insubstantial and do not merit further review.

1. There was conflicting evidence at trial whether HBC was prepared to enter the Raleigh hospital

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[19] In this case the North Carolina authorities found a need for HBC's expansion. See page 3, *supra*.

market in 1972 (Pet. App. 20a). Accordingly, the district court instructed the jury that in order to show that the defendants proximately caused its injury, HBC had to establish that it was prepared to expand its business in 1972 (HBC Br. in Opp. App. 11a). The court listed four items HBC was required to show to make out its case of readiness to expand: ability to finance the expansion; consummation of contracts; affirmative action to expand; and appropriate background and experience (*id.* at 12a). Finally, the court submitted to the jury, pursuant to Fed. R. Civ. P. 49(a), a written question whether the defendants' conduct proximately caused injury to HBC's business. 82-1762 Cross-Pet. App. 2a. The jury answered the question "yes".

Rex claims that because the district court declined to submit a separate special verdict question on the preparedness issue, it wrongly withdrew that issue from the jury. 82-1762 Cross-Pet. 10. This contention is incorrect. Special verdict questions are very helpful in antitrust and in other complex litigation; and district courts should look with favor upon requests for their use. *E.g.*, *Bissett* v. *Ply-Gem Industries, Inc.*, 533 F.2d 142, 150 (5th Cir. 1976); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Nevertheless, while a party is entitled to have all material factual issues presented to the jury, it has no right to have them presented in the form of special verdict questions. As the court of appeals correctly held (Pet. App. 20a), it is within the district court's broad discretion whether to submit such questions. *Tights, Inc.* v. *Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir.), cert. denied, 429 U.S. 980 (1976); *Miley* v. *Oppenheimer & Co.*,

637 F.2d 318, 334 (5th Cir. 1981). And where a court has chosen to combine instructions with special verdict questions under Fed. R. Civ. P. 49(a), procedural fairness requires only that the written questions read together with the general instructions fairly present the issue to the jury. See *Columbia Plaza Corp.* v. *Security National Bank*, 676 F.2d 780, 789 (D.C. Cir. 1982); *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 649 (3d Cir. 1980); *Dreiling* v. *General Electric Co.*, 511 F.2d 768, 774-775 (5th Cir. 1975); *Perzinski* v. *Chevron Chemical Co.*, 503 F.2d 654, 660 (7th Cir. 1974). In this case, the general instructions and special verdict question No. 4 together provided just such a fair presentation.[20]

2. The court of appeals held (Pet. App. 17a-18a) that there was sufficient evidence for the jury to find that the defendants' anticompetitive actions proximately caused both the delay of construction of HBC's hospital until February 1973, when the state certificate of need law was invalidated, and further substantial delay by exposing HBC to the new require-

[20] The present case is thus not in conflict with the cases cited by Rex (82-1762 Cross-Pet. 9) in which the instructions read together with the special questions did not permit the jury to find for a party even though it might have believed that party's contention on a disputed and controlling issue. See *Simien* v. *S.S. Kresge Co.*, 566 F.2d 551, 556 (5th Cir. 1978) (product liability case in which special questions did not permit the jury to find for the defendant on the ground that, as the defendant claimed, it did not sell plaintiff the offending product in question); *Cutlass Productions, Inc.* v. *Bregman*, 682 F.2d 323, 327 (2d Cir. 1982) (breach of contract action in which special questions did not permit the jury to find for the defendant on the ground that, as defendant claimed, the contract, if any, was an employment contract terminable for cause).

ments of Section 1122 of the Social Security Act, 42 U.S.C. 1320a-1, and to rising interest rates and other difficulties. Rex does not seek review of this ruling. It does, however, claim that the court of appeals erred when it also held that "delay in HBC's ability to enter the Raleigh hospital market is precisely the type of injury that the alleged 'allocation of the market' and 'refusal to deal' were likely to cause and [Rex] cannot escape liability merely because the injurious delay was compounded by enactment of the § 1122 amendments and rising interest rates" (Pet. App. 19a-20a). Rex contends (82-1762 Cross-Pet. 12) that this holding is contrary to the rule set forth in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that a plaintiff may recover only for "antitrust injur[ies]."

The court of appeals' ruling is entirely in accord with *Brunswick*, however. In *Brunswick* the Court denied recovery to a plaintiff whose only claim of injury from an acquisition allegedly violative of Section 7 of the Clayton Act (15 U.S.C. 18) was that, but for the acquisition, the acquired firm would have gone out of business and plaintiff would have faced less competition and made more money. The Court explained that to allow such a suit "divorces antitrust recovery from the purposes of the antitrust laws * * * and would authorize damages for losses which are of no concern to the antitrust laws" (429 U.S. at 487; footnote omitted). In the present case, by contrast, the injuries for which Rex has been held liable are central to the concern of the antitrust laws, for competition with the defendants was stifled as the expectable and proximately caused result of the defendants' anticompetitive conduct. The fact that Rex's unlawful exclusion of HBC lasted so long that sub-

sequent events delayed HBC's entry even further provides no basis under *Brunswick* or any other precedent for excusing Rex from liability for all of the injury proximately caused by its exclusionary conduct.

CONCLUSION

The petition for a writ of certiorari should be granted in No. 82-1633 and denied in No. 82-1762.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA RALEIGH DIVISION

Civil Action File No. 4048

HOSPITAL BUILDING COMPANY, PLAINTIFF

v.

TRUSTEES OF THE REX HOSPITAL, a corporation, JOSEPH BARNES, and RICHARD URQUHART, JR., DEFENDANTS

COURT'S INSTRUCTIONS TO THE JURY

* * * * *

First Amendment Immunity

If you find that the defendants' conduct is not protected by the State action immunity that I have just described to you, you must also consider whether a second immunity applies to defendants' actions before the North Carolina Medical Care Commission and the Superior Court of Wake County. This second immunity is based on the principle that activity protected by the First Amendment to the United States Constitution may not be made the basis of a violation of the antitrust laws. The First Amendment to the Constitution protects the rights of free speech and the right to petition the government.

No violation of the antitrust laws can be predicated upon mere attempts to influence the passage or enforcement of laws. Therefore, the antitrust laws do not prohibit two or more persons from associating together in an attempt to persuade the government to take particular action with respect to a law that would produce a restraint or monoopoly. The right of petition is one of the freedoms protected by the Bill of Rights.

For all purposes in determining whether an action was made under the First Amendment right to petition the government, "government" includes the executive, legislative, judicial and regulatory bodies, including the North Carolina Medical Care Commission and the Superior Court of Wake County. Therefore, the immunity from the antitrust laws for seeking a governmental determination applies to adjudicatory agencies such as the North Carolina Medical Care Commission and the courts such as the Wake County Superior Court. That is because groups with common interests do not violate the antitrust laws when they use the channels and procedures of State agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors even if direct injury to their competitors was an incidental result of those activities.

This immunity from the antitrust laws is not limited to the expression of political views; rather, the immunity also applies to advocating a person's business and economic interests in relation to his competitors.

Defendants' First Amendment right to seek governmental action does not depend on their motive or intent in seeking governmental action. Thus, an anti-

competitive purpose does not make the conduct illegal. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.

However, this Constitutionally protected activity is not absolute. Thus, if plaintiff proves by a preponderance of the evidence that defendants' actions were a mere sham to cover what was nothing more than an attempt to interfere directly with the business relationship of a competitor, such actions do not enjoy immunity from the antitrust laws. In this connection, conduct in abuse of the adjudicatory or judicial process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws. Examples of such conduct include:

1. unethical conduct;
2. conspiracy with representatives of an adjudicatory agency;
3. barring of free and unlimited access to an adjudicatory agency;
4. misrepresentation; and
5. groundless litigation.

Plaintiff has the burden of proof of establishing by a preponderance of the evidence that defendants' alleged conduct was an abuse of the adjudicatory or judicial process which was part of a larger conspiracy to restrain trade or to monopolize a market.

With respect to the adjudicatory process, if the acts of a counsel for an adjudicatory agency were those of a participating conspirator, then the conduct of any other member of the conspiracy before the agency would not be immunized from the antitrust laws.

Again, plaintiff has the burden of proof of establishing such acts by a preponderance of the evidence.

If the courts are used or litigation is filed as part of an overall scheme to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity. On this aspect, too, the burden of proof is on the plaintiff.

As I have said before, even if you find that defendants' conduct is not immune from the antitrust laws, that finding does not satisfy the plaintiff's burden of proving the usual elements of an antitrust violation. Plaintiff still has the burden of proving the usual elements of an antitrust offense.

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